

No. 13538

United States
Court of Appeals
for the Ninth Circuit.

this only.

ATLAS ASSURANCE COMPANY, LTD., a Corporation; AETNA INSURANCE COMPANY, a Corporation; THE HOME INSURANCE COMPANY, a Corporation; PROVIDENCE a Corporation; NATIONAL UNNON FIRE INSURANCE COMPANY, a Corporation; and NIAGARA FIRE INSURANCE COMPANY, a Corporation,

Appellants.

vs.

DARBY MILLS, INC., a Corporation, and ALEX SHULMAN, Doing Business as Alex Shulman Co.,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Montana.

FILED

MAR 2 1952

PAUL R. O'BRIEN
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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MURPHY, GARLINGTON & PAULY,

Missoula, Montana;

WALCHLI, KORN & WARDEN,

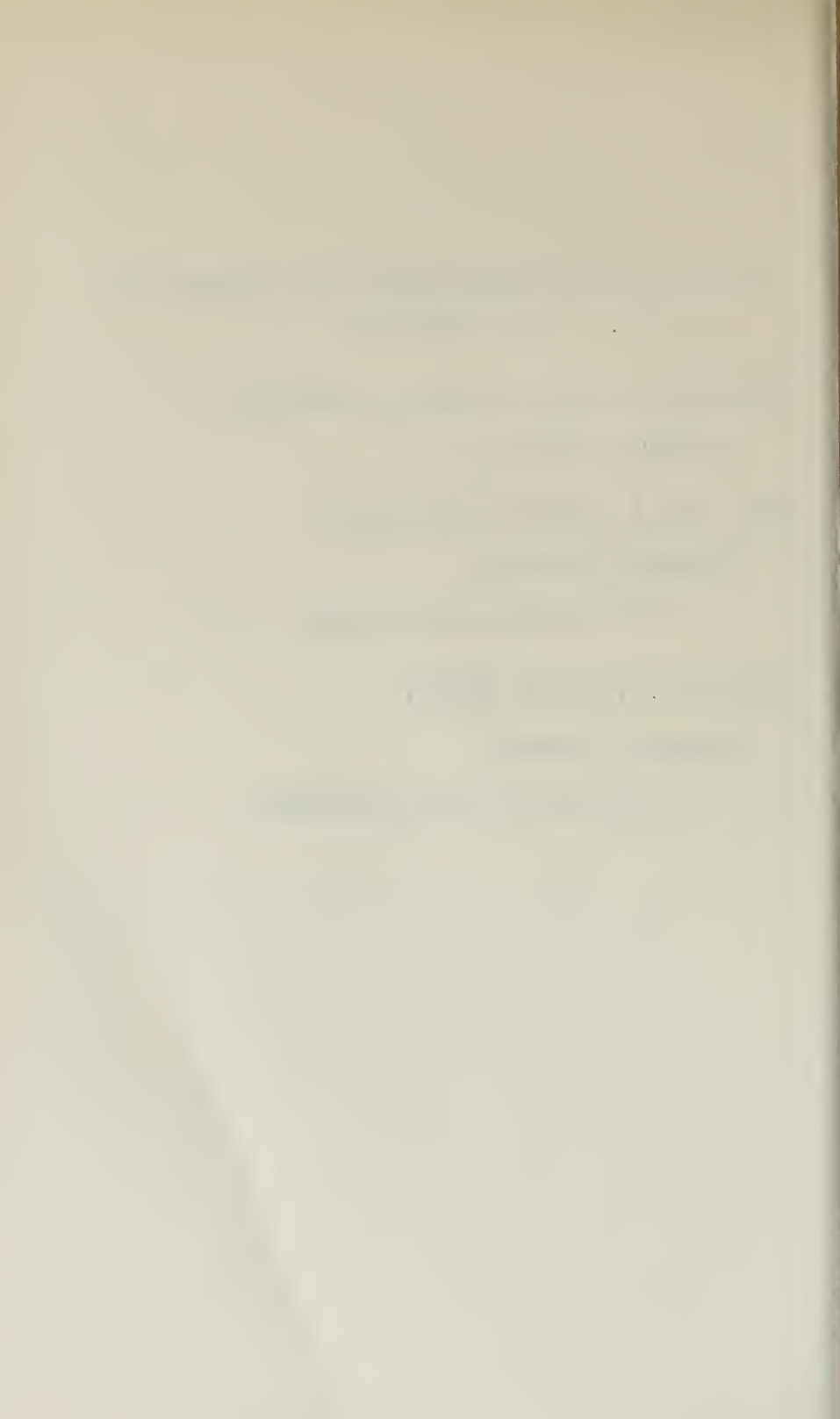
Kalispell, Montana,

For Plaintiffs and Appellees.

SMITH, BOONE & RIMEL,

Missoula, Montana,

For Defendants and Appellants.



In the District Court of the United States in and
for the District of Montana

No. 566

DARBY MILLS, INC., a Corporation, and ALEX
SHULMAN, Doing Business as ALEX SHUL-
MAN CO.,

Plaintiffs,

vs.

ATLAS ASSURANCE COMPANY, LTD., a Cor-
poration, AETNA INSURANCE COMPANY,
a Corporation, NEW HAMPSHIRE FIRE
INSURANCE COMPANY, a Corporation,
THE HOME INSURANCE COMPANY, a
Corporation, PROVIDENCE WASHINGTON
INSURANCE COMPANY, a Corporation,
NATIONAL UNION FIRE INSURANCE
COMPANY, a Corporation, and NIAGARA
FIRE INSURANCE COMPANY, a Corpo-
ration,

Defendants.

COMPLAINT

Come now the plaintiffs in the above-entitled ac-
tion and for cause complain and allege:

I.

That at all times herein mentioned the plaintiff,
Darby Mills, Inc., was, ever since has been and now
is a corporation duly organized and existing under
and by virtue of the laws of the State of Montana,

with its principal place of business at Darby, in the County of Ravalli, State of Montana.

II.

That at all times herein mentioned the defendant, Atlas Assurance Company, Ltd., was, ever since has been and now is a corporation duly organized and existing under the laws of England, and duly authorized to do and actually doing business in the State of Montana as a foreign corporation; and that said defendant at all times herein mentioned was duly authorized to transact a general fire insurance business and to write fire insurance policies in the State of Montana.

III.

That at all times herein mentioned the defendant, Aetna Insurance Company, was, ever since has been and now is a corporation duly organized and existing under the laws of the State of Connecticut, and duly authorized to do and actually doing business in the State of Montana as a foreign corporation; and that said defendant at all times herein mentioned was duly authorized to transact a general fire insurance business and to write fire insurance policies in the State of Montana.

IV.

That at all times herein mentioned the defendant, New Hampshire Fire Insurance Company, was, ever since has been and now is a corporation duly organized and existing under the laws of the State of New Hampshire, and duly authorized to do and

actually doing business in the State of Montana as a foreign corporation; and that said defendant at all times herein mentioned was duly authorized to transact a general fire insurance business and to write fire insurance policies in the State of Montana.

V.

That at all times herein mentioned the defendant, The Home Insurance Company, was, ever since has been and now is a corporation duly organized and existing under the laws of the State of New York, and duly authorized to do and actually doing business in the State of Montana as a foreign corporation; and that said defendant at all times herein mentioned was duly authorized to transact a general fire insurance business and to write fire insurance policies in the State of Montana.

VI.

That at all times herein mentioned the defendants, Providence Washington Insurance Company, was, ever since has been and now is a corporation duly organized and existing under the laws of the State of Rhode Island, and duly authorized to do and actually doing business in the State of Montana as a foreign corporation; and that said defendant at all times herein mentioned was duly authorized to transact a general fire insurance business and to write fire insurance policies in the State of Montana.

VII.

That at all times herein mentioned the defendant, National Union Fire Insurance Company, was, ever

since has been and now is a corporation duly organized and existing under the laws of the State of Pennsylvania, and duly authorized to do and actually doing business in the State of Montana as a foreign corporation; and that said defendant at all times herein mentioned was duly authorized to transact a general fire insurance business and to write fire insurance policies in the State of Montana.

VIII.

That at all times herein mentioned the defendant, Niagara Fire Insurance Company, was, ever since has been and now is a corporation duly organized and existing under the laws of the State of New York, and duly authorized to do and actually doing business in the State of Montana as a foreign corporation; and that said defendant at all times herein mentioned was duly authorized to transact a general fire insurance business and to write insurance policies in the State of Montana.

IX.

That at the time of the issuance of the various fire insurance policies herein referred to, and sued upon, by the various defendants as herein set forth, the plaintiff, Darby Mills, Inc., was the owner of the property described in and covered by each of said insurance policies, which property was then and there situated at Conner in Ravalli County, State of Montana, and that the property for which loss by fire is claimed in this action consisted of machinery and equipment situated in the plaintiff's, Darby

Mills, Inc., sawmill at Conner in Ravalli County, Montana, and was insured by the seven defendant insurance companies herein named in the aggregate sum of \$12,500.00, as shown in Form 78-B attached to each of said policies and forming an express part thereof.

X.

That on or about January 28, 1950, in consideration of the payment by the plaintiff, Darby Mills, Inc., to the defendant, Atlas Assurance Company, Ltd., of a cash premium, the exact amount of which is unknown to the plaintiffs herein, but is well known to said defendant, and to each of the defendants herein, it being the respective pro-rata share of the total premium for said insurance as the amount of insurance underwritten by said defendant, Atlas Assurance Company, Ltd., bore to the total amount for which said property was insured, said defendant, Atlas Assurance Company, Ltd., by and through its agent and representative, Urton and Company of Missoula, Montana, made, executed and delivered to the plaintiff, Darby Mills, Inc., its policy of insurance in writing, No. S856533 in the sum of \$5,000.00 on standard policy form known as New York Standard Fire Insurance Policy (1943), which form is well known to said Atlas Assurance Company, Ltd., to which insurance policy there was attached Standard Form 78-B (July 1950) as per copy thereof hereto attached, marked Exhibit "A" and hereby made a part hereof. That said policy was issued for a period of one year from its date

and expressly covered the machinery and equipment which was destroyed by fire as herein complained of, and that said insurance policy was in good standing and in full force and effect at the time of the loss herein complained of, except that by endorsement made on said policy on or about November 3, 1950, the limit of liability under said policy changed the pro-rata proportion from \$5,000.00/27,500.ths of each of the amounts specified, to \$5,000.00/26,300.ths of each of the amounts specified. That since said loss the said defendant, Atlas Assurance Company, Ltd., has picked up said policy and the plaintiffs do not now have possession thereof and are therefore unable to herein set out said policy in its complete form, but that said defendant has possession and full knowledge of said policy and the full contents thereof.

XI.

That on or about January 28, 1950, in consideration of the payment by the plaintiff, Darby Mills, Inc., to the defendant, Aetna Insurance Company, of a cash premium, the exact amount of which is unknown to the plaintiffs herein, but is well known to said defendant, and to each of the defendants herein, it being the respective pro-rata share of the total premium for said insurance as the amount of insurance underwritten by said defendant, Aetna Insurance Company, bore to the total amount for which said property was insured, said defendant, Aetna Insurance Company, by and through its agent and representative, Urton and Company of Mis-

soula, Montana, made, executed and delivered to the plaintiff, Darby Mills, Inc., its policy of insurance in writing, No. 25-25827 in the sum of \$5,000.00 on standard policy form known as New York Standard Fire Insurance Policy (1943), which form is well known to said Aetna Insurance Company, to which insurance policy there was attached Standard Form 78-B (1950) as per copy thereof hereto attached, marked Exhibit "A" and hereby made a part hereof. That said policy was issued for a period of one year from its date and expressly covered the machinery and equipment which was destroyed by fire as herein complained of, and that said insurance policy was in good standing and in full force and effect at the time of the loss herein complained of, except that by endorsement made on said policy on or about November 3, 1950, the limit of liability under said policy changed the pro-rata proportion from \$5,000.00/27,500.ths of each of the amounts specified, to \$5,000.00/26,300.ths of each of the amounts specified. That since said loss the said defendant, Aetna Insurance Company, has picked up said policy and the plaintiffs do not now have possession thereof and are therefore unable to herein set out said policy in its complete form, but that said defendant has possession and full knowledge of said policy and the full contents thereof.

XII.

That on or about January 28, 1950, in consideration of the payment by the plaintiff, Darby Mills, Inc., to the defendant, New Hampshire Fire Insur-

ance Company, of a cash premium, the exact amount of which is unknown to the plaintiffs herein, but is well known to said defendant, and to each of the defendants herein, it being the respective pro-rata share of the total premium for said insurance as the amount of insurance underwritten by said defendant, New Hampshire Fire Insurance Company, bore to the total amount for which said property was insured, said defendant, New Hampshire Fire Insurance Company, by and through its agent and representative, Urton and Company of Missoula, Montana, made, executed and delivered to the plaintiff, Darby Mills, Inc., its policy of insurance in writing, No. 1-66-19 in the sum of \$5,000.00 on standard policy form known as New York Standard Fire Insurance Policy (1943), which form is well known to said New Hampshire Fire Insurance Company, to which insurance policy there was attached Standard Form 78-B (1950) as per copy thereof hereto attached, marked Exhibit "A" and hereby made a part hereof. That said policy was issued for a period of one year from its date and expressly covered the machinery and equipment which was destroyed by fire as herein complained of, and that said insurance policy was in good standing and in full force and effect at the time of the loss herein complained of, except that by endorsement made on said policy on or about November 3, 1950, the limit of liability under said policy changed the pro-rata proportion from \$5,000.00/27,500.ths of each of the amounts specified, to \$5,000.00/26,300.ths

of each of the amounts specified. That since said loss the said defendant, New Hampshire Fire Insurance Company, has picked up said policy and the plaintiffs do not now have possession thereof and are therefore unable to herein set out said policy in its complete form, but that said defendant has possession and full knowledge of said policy and the full contents thereof.

XIII.

That on or about January 28, 1950, in consideration of the payment by the plaintiff, Darby Mills, Inc., to the defendant, The Home Insurance Company, of a cash premium, the exact amount of which is unknown to the plaintiffs herein, but is well known to said defendant, and to each of the defendants herein, it being the respective pro-rata share of the total premium for said insurance as the amount of insurance underwritten by said defendant, The Home Insurance Company, bore to the total amount for which said property was insured, said defendant, The Home Insurance Company, by and through its agent and representative, Urton and Company of Missoula, Montana, made, executed and delivered to the plaintiff, Darby Mills, Inc., its policy of insurance in writing, No. 1070 in the sum of \$5,000.00 on standard policy form known as New York Standard Fire Insurance Policy (1943), which form is well known to said Home Insurance Company, to which insurance policy there was attached Standard Form 78-B (1950) as per copy thereof hereto attached, marked Exhibit "A"

and hereby made a part hereof. That said policy was issued for a period of one year from its date and expressly covered the machinery and equipment which was destroyed by fire as herein complained of, and that said insurance policy was in good standing and in full force and effect at the time of the loss herein complained of, except that by endorsement made on said policy on or about November 3, 1950, the limit of liability under said policy changed the pro-rata proportion from \$5,000.00/27,500.ths of each of the amounts specified, to \$5,000.00/26,300.ths of each of the amounts specified. That since said loss the said defendant, The Home Insurance Company, has picked up said policy and the plaintiffs do not now have possession thereof and are therefore unable to herein set out said policy in its complete form, but that said defendant has possession and full knowledge of said policy and the full contents thereof.

XIV.

That on or about November 3, 1950, in consideration of the payment by the plaintiff, Darby Mills, Inc., to the defendant, Providence Washington Insurance Company, of a cash premium, the exact amount of which is unknown to the plaintiffs herein, but is well known to said defendant, and to each of the defendants herein, it being the respective pro-rata share of the total premium for said insurance as the amount of insurance underwritten by said defendant, Providence Washington Insurance Company, bore to the total amount for which said prop-

erty was insured, said defendant, Providence Washington Insurance Company, by and through its agent and representative, Urton and Company of Missoula, Montana, made, executed and delivered to the plaintiff, Darby Mills, Inc., its policy of insurance in writing, No. 821411 in the sum of \$2100.00 on standard policy form known as New York Standard Fire Insurance Policy (1943), which form is well known to said Providence Washington Insurance Company, to which insurance policy there was attached Standard Form 78-B (1950) as per copy thereof hereto attached, marked Exhibit "B" and hereby made a part hereof. That said Policy was issued for a period of one year from its date and expressly covered the machinery and equipment which was destroyed by fire as herein complained of, and that said insurance policy was in good standing and in full force and effect at the time of the loss herein complained of. That since said loss the said defendant, Providence Washington Insurance Company, has picked up said policy and the plaintiffs do not now have possession thereof and are therefore unable to herein set out said policy in its complete form, but that said defendant has possession and full knowledge of said policy and the full contents thereof.

XV.

That on or about November 3, 1950, in consideration of the payment by the plaintiff, Darby Mills, Inc., to the defendant, National Union Fire Insurance Company, of a cash premium, the exact amount of which is unknown to the plaintiffs herein, but is

well known to said defendant, and to each of the defendants herein, it being the respective pro-rata share of the total premium for said insurance as the amount of insurance underwritten by said defendant, National Union Fire Insurance Company, bore to the total amount for which said property was insured, said defendant, National Union Fire Insurance Company, by and through its agent and representative, Urton and Company of Missoula, Montana, made, executed and delivered to the plaintiff, Darby Mills, Inc., its policy of insurance in writing, No. 571348 in the sum of \$2100.00 on standard policy form known as New York Standard Fire Insurance Policy (1943), which form is well known to said National Union Fire Insurance Company, to which insurance policy there was attached Standard Form 78-B (1950) as per copy thereof hereto attached, marked Exhibit "B" and hereby made a part hereof. That said policy was issued for a period of one year from its date and expressly covered the machinery and equipment which was destroyed by fire as herein complained of, and that said insurance policy was in good standing and in full force and effect at the time of the loss herein complained of. That since said loss the said defendant, National Union Fire Insurance Company, has picked up said policy and the plaintiffs do not now have possession thereof and are therefore unable to herein set out said policy in its complete form, but that said defendant has possession and full knowledge of said policy and the full contents thereof.

XVI.

That on or about November 3, 1950, in consideration of the payment by the plaintiff, Darby Mills, Inc., to the defendant, Niagara Fire Insurance Company, of a cash premium, the exact amount of which is unknown to the plaintiffs herein, but is well known to said defendant, and to each of the defendants herein, it being the respective pro-rata share of the total premium for said insurance as the amount of insurance underwritten by said defendant, Niagara Fire Insurance Company, bore to the total amount for which said property was insured, said defendant, Niagara Fire Insurance Company, by and through its agent and representative, Urton and Company of Missoula, Montana, made, executed and delivered to the plaintiff, Darby Mills, Inc., its policy of insurance in writing, No. 24977 in the sum of \$2100.00 on standard policy form known as New York Standard Fire Insurance Policy (1943), which form is well known to said Niagara Fire Insurance Company, to which insurance policy there was attached Standard Form 78-B (1950) as per copy thereof hereto attached, marked Exhibit "B" and hereby made a part hereof. That said policy was issued for a period of one year from its date and expressly covered the machinery and equipment which was destroyed by fire as herein complained of, and that said insurance policy was in good standing and in full force and effect at the time of the loss herein complained of. That since said loss the said defendant, Niagara Fire Insurance Company, has picked up said policy and the plaintiffs do not now have possession

thereof and are therefore unable to herein set out said policy in its complete form, but that said defendant has possession and full knowledge of said policy and the full contents thereof.

XVII.

That the firm of Urton and Company at Missoula, Montana, was the duly authorized agent for each of said defendant insurance companies, and as such agent was authorized and empowered to receive applications, to take risks for insurance and to make out, deliver and endorse policies of insurance on property for the plaintiffs, and each of them, as well as others, against loss or damage by fire, and to collect and receive premiums therefor, and to make oral agreements for insurance to take effect prior to the issuance of the policy or making endorsements thereon. That each of said insurance policies herein referred to were made, issued and delivered by each of said respective defendant insurance companies to the plaintiff, Darby Mills, Inc., by and through their said agent and representative, Urton and Company of Missoula, Montana; and that at all times in this Complaint mentioned said agent and representative, Urton and Company, had its office in Missoula, Montana, and represented itself to be and was in fact the insurance agent for each of said defendant companies.

XVIII.

That on the 15th day of December, 1950, the plaintiff, Darby Mills, Inc., entered into an agreement with Alex Shulman Co., a co-partnership of Somers,

Montana, for the sale by said Darby Mills, Inc., to said Alex Shulman Co., of all the machinery and equipment situated in the sawmill belonging to Darby Mills, Inc., at Conner, Montana, being the machinery and equipment designated in and covered by each of said insurance policies so issued by each of the defendants as herein set forth. That as a part of said Sales Agreement above referred to between the plaintiff Darby Mills, Inc., and Alex Shulman Co. it was agreed between the seller and purchaser that all insurance policies then in force covering said machinery and equipment be endorsed to show such sale and to provide protection against loss or damage by fire to both said seller and said buyer as their respective interest might appear at the time of any loss or damage sustained thereunder.

XIX.

That pursuant to said agreement of sale and on the same day, to wit, December 15, 1950, the plaintiff, Darby Mills, Inc., the insured named in each of said policies, requested and instructed Urton and Company at Missoula, Montana, as the agent of each of said defendant insurance companies, to make such endorsement above referred to on each of said insurance policies insofar as said machinery and equipment was concerned, which endorsement was to provide that any loss or damage sustained under said policies be made payable to Darby Mills, Inc., and to Alex Shulman Co. as their respective interests might appear. That said Urton and Company,

as such agent and representative of each of said insurance companies, then and there agreed to so endorse each of said policies in keeping with the request of said insured, Darby Mills, Inc., and assured said Darby Mills, Inc., that the matter would be taken care of, and the plaintiff, Darby Mills, Inc., relied upon the agreement of said agent for said defendants that each of said policies would be so endorsed to protect both said seller and said purchaser of said machinery and equipment so covered by said policies.

XX.

That on or about January 2, 1951, the following described items of machinery and equipment so covered by said defendants' insurance policies, were still situated in said plaintiff's, Darby Mills, Inc., sawmill at Conner, Montana, and were wholly destroyed by fire.

XXI.

That the items of property above referred to so destroyed by fire were, and the value thereof at the time of said fire, was as is itemized and set forth in Exhibit "C" attached hereto and by this reference made a part hereof, and that by reason of such destruction of said property as aforesaid the plaintiffs suffered loss and sustained damages in the sum of \$3460.24.

XXII.

That on or about January 3, 1951, immediately after the occurrence of said fire, the plaintiffs notified each of said defendant insurance companies, as

required by the terms of said policies, of such fire and loss by notifying said defendants' agent and representative, Urton and Company, at their office in Missoula, Montana. That immediately thereafter, one Harry E. Noel, the adjuster, agent and representative of each of said defendant insurance companies, with his office at Missoula, Montana, made an investigation of the premises and of said fire loss at Conner, Montana, under the said policies so issued and endorsed, covering said machinery and equipment. That on or about January 9, 1951, and within 60 days of said loss, the plaintiffs furnished and delivered to said Harry E. Noel, as such adjuster and agent for said defendant insurance companies, an itemized written list and statement of the property so destroyed by fire, copy of which is shown in Exhibit "C" and attached hereto and by this reference made a part hereof, and otherwise furnished information and proof of said loss to said Harry E. Noel as such agent and adjuster for said defendant companies, furnishing him with all of the facts within the knowledge of the plaintiffs as to the time and place of said fire and the ownership of said property, the value thereof and the fact that said property so destroyed or damaged was at the time of said fire situated in exactly the same place and location as the property was in at the time of the issuance of said insurance policies; and that said plaintiffs otherwise furnished the said defendants' agent and adjuster, Harry E. Noel, all information required by him under said policies, and the plain-

tiffs otherwise performed all of the conditions of said policies on plaintiffs' part to be kept and performed.

XXIII.

By the terms of said Sales Agreement the purchaser Alex Shulman Co. agreed to pay Darby Mills, Inc., the sum of \$3375.00 at the time of the making of said Agreement, and the balance of \$3375.00 on January 15, 1951. That at the time of said fire on January 2, 1951, there remained unpaid and there is now due and unpaid to the plaintiff, Darby Mills, Inc., on said sale price, under said Sales Agreement, of said machinery and equipment, the sum of \$3375.00. That the plaintiff, Darby Mills, Inc., at the time of said fire loss, had an interest in said property and said insurance covering the same to the extent of \$3375.00, and that the plaintiff, Alex Shulman Co., had an interest therein to the extent of the value of the property so destroyed or damaged by said fire, subject to the claim of the plaintiff, Darby Mills, Inc., therein.

XXIV.

That on or about July 30, 1951, and subsequent to said fire loss, the co-partnership of Alex Shulman Co. was dissolved and as part of said partnership dissolution all of said partnership interest in and to said personal property so purchased from plaintiff, Darby Mills, Inc., and said partnership's right in and to all choses in action arising from the fire loss herein complained of were duly and regularly transferred to the plaintiff, Alex Shulman,

who has since continued to do and is now doing business as Alex Shulman Co.

XXV.

That said defendants, or any of *the*, have not paid the said loss or damage herein complained of, or any part thereof, and that the same is now due, owing and unpaid from said defendants to the plaintiffs herein.

Wherefore, the plaintiffs pray judgment against the defendants herein:

1. For the sum of \$3460.24, together with interest thereon at the rate of 6% per annum from March 2, 1951.
2. For plaintiffs' costs and disbursements herein.
3. For such other and further relief as may be just and proper in the premises.

MURPHY, GARLINGTON &
PAULY,

Attorneys for Plaintiff, Darby
Mills, Inc.

WALCHLI, KORN & WARDEN,
Attorneys for Plaintiff, Alex
Shulman Co.

State of Montana,
County of Flathead—ss.

D. J. Korn, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiffs in the above-entitled action and makes this verification for and on behalf of said plaintiffs for the reason and upon the ground that none of the plaintiffs, nor any officer thereof, is a resident of the State of Montana, where this affiant resides and this action is brought; that affiant has read the foregoing Complaint, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

D. J. KORN.

Subscribed and sworn to before me this 31st day of December, 1951.

[Seal] MERRITT N. WARDEN,
Notary Public for the State of Montana, Residing at
Kalispell, Montana.

My commission expires January 22, 1952.

Service of copy acknowledged.

[Endorsed]: Filed February 7, 1952.

[Title of District Court and Cause.]

ANSWER

Defendants, for answer to plaintiffs' complaint, allege:

I.

Admit the allegations of Paragraphs I to VIII, inclusive, of plaintiffs' complaint.

II.

Admit the allegations of Paragraph IX of the complaint, but in this connection specifically allege that at the time of the fire mentioned in the complaint, the plaintiff Darby Mills, Inc., had no right, title or interest of any kind in the property described in Exhibit "C" attached to the complaint.

III.

Admit the allegations of Paragraphs X to XVI, inclusive, except: Defendants deny that any of the machinery and equipment which was destroyed by fire as alleged in the complaint, was covered by any of the policies described in Paragraphs X to XVI, inclusive. In this connection allege that prior to the date of the fire alleged in the complaint, the plaintiff Darby Mills, Inc., sold all of the equipment and machinery described in the complaint and that at the time of the fire the said Darby Mills, Inc., had no insurable interest in the said property, or any part thereof, and deny that insofar as the policies mentioned in said Paragraphs X to XVI, inclusive, purported to cover the property alleged to have been destroyed by fire, that said policies were not in good standing. Defendants admit that the following policies were canceled and delivered to the companies issuing them, to wit:

Providence Washington Insurance Company,
Policy No. 821411;

National Union Fire Insurance Company,
Policy No. 571348;

Niagara Fire Insurance Company, Policy
No. 24977,

but deny that the remaining policies described in the complaint were picked up or are in possession of the companies issuing them.

IV.

Admit that the firm of Urton and Company at Missoula, Montana, was an agent for the insurance companies named in the complaint and had power to receive applications and take risks for insurance, and to make out and endorse policies of insurance on property against loss by fire. Admit that said Urton and Company, had power to collect and receive premiums. Admit that Urton and Company, as the agents of the defendants, did issue the policies described in Paragraphs X to XVI of the complaint. Deny each and every allegation, matter and thing contained in Paragraph XVII of the complaint not herein specifically admitted, and specifically deny that Urton and Company had power to make oral assignments of an interest in insurance policies.

V.

Deny the allegations of Paragraph XVIII and XIX of said complaint, except as qualified in Paragraph XVIII hereof.

VI.

Admit that on or about January 2, 1951, there was a fire at the sawmill at Connor, Montana, and that the buildings were destroyed, and that some machinery and equipment was destroyed or damaged. State that the defendants have no knowledge or information sufficient to form a belief with respect to the exact items of property which were damaged or destroyed or with respect to the value of such items. Deny each and every allegation, matter and thing set out in Paragraph XX and XXI of said complaint not herein specifically admitted or denied upon information and belief.

VII.

With respect to the allegations of Paragraphs XXII of the complaint, the defendants deny all the allegations thereof except as herein qualified or admitted.

Defendants allege that on or about January 3, 1951, the plaintiff Darby Mills, Inc., notified Urton and Company that there had been a fire at the sawmill of said plaintiff at Connor, Montana. Thereafter, Harry Noel, an adjuster for the defendant, visited the scene of the fire and investigated the same. That on or about April 17, 1951, the plaintiff Darby Mills, Inc., furnished to the defendants a proof of loss, which said proof described buildings which were covered by the insurance policies described in the complaint. That thereafter the defendants paid to Darby Mills, Inc., the entire amount shown on the proof of loss furnished by said Darby

Mills, Inc. That the said Darby Mills, Inc., at no time claimed any loss or damage by reason of the destruction or damage done to the personal property described in Exhibit "C" attached to the complaint, or made any proof of loss with respect thereto. That on or about January 9, 1951, the plaintiff, Alex Shulman, addressed a letter to Harry Noel and enclosed in said letter a list of equipment claimed to have been destroyed in the fire. That such list was identical with Exhibit "C" attached to the complaint, except that it did not contain any of the figures shown in said Exhibit "C" as to the value of said items. That no further or other proof of loss was submitted to the defendants, or either of them, by said plaintiff Alex Shulman.

VIII.

Admit that Darby Mills, Inc., and Alex Shulman Co., agreed to sell and buy certain machinery and equipment. In this connection allege that the agreement was reduced to writing. That a copy of said agreement is attached hereto, marked Exhibit 1, and by this reference made a part hereof. Deny that the agreement between the said plaintiffs was other or different than that disclosed in Exhibit 1. Deny that defendants have sufficient knowledge or information to form a belief with respect to whether Alex Shulman has paid Darby Mills, Inc., the balance of \$3,375.00.

Deny each and every allegation, matter and thing contained in Paragraph XXIII of the complaint not herein admitted or denied upon information

and belief, and specifically deny that the plaintiff, Darby Mills, Inc., had any interest of any kind in the property described in Exhibit "C" attached to the complaint after December 15, 1950.

IX.

Deny that the defendants have any knowledge or information sufficient to form a belief with respect to the allegations of Paragraph XXIV of said complaint.

X.

Admit that defendants have not paid any amount to plaintiffs by reason of the alleged damage to the machinery and equipment described in the complaint.

Deny each and every allegation, matter and thing contained in Paragraph XXV of plaintiffs' complaint.

For Further Answer to Plaintiffs' Complaint,
the Defendants Allege

I.

That each and all of the policies of insurance described in the plaintiffs' complaint contained the following provisions, to wit:

"Assignment of this policy shall not be valid except with the written consent of the Company."

"No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added thereto."

That the defendants did not, nor did any one of them, consent in writing to the assignment in whole or in part of all or any one of the policies described in the complaint, or any thereof.

II.

That on or about the 15th day of December, 1950, the plaintiff Darby Mills, Inc., by an instrument in writing sold unto Alex Shulman Co. all of the machinery and equipment described in the policies of insurance set forth in plaintiffs' complaint. That a copy of said writing is annexed hereto, marked Exhibit 1¹, and by this reference made a part hereof. That by virtue of said instrument, the plaintiff Darby Mills, Inc., ceased to have any interest in the property described in the said policies, and in the complaint, on the 15th day of December, 1950, and did not, on January 2, 1951, the time of the fire described in the complaint, have any insurable interest in the said property, or any part thereof.

III.

That the plaintiff, Alex Shulman Co., is not now, and was not at any of the times mentioned in the complaint, an insured under the insurance policies described in the complaint, or any of them.

For Further Answer to Plaintiffs' Complaint,
the Defendants Allege

I.

That each and all of the policies described in the complaint contain the following provision:

[¹See Plaintiffs' Exhibit No. 1 in evidence, pages 96 to 99 of this printed record.]

“The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed, and sworn to by the insured, stating the knowledge and belief of the insured as to the following: The time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof, and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described, and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged.”

That the plaintiff Darby Mills, Inc., did not, within sixty days after the 2nd day of January, 1951, or at all, make any claim to the defendants or any of them by reason of a loss of the personal property described in the complaint, and did not furnish to the defendants, or any of them, any sworn proof of loss of any kind with respect to said machinery and equipment.

III.

That the plaintiff Alex Shulman did not, within sixty days after the said fire, or at all, furnish any statement of any kind in the nature of a proof of loss except the letter and list, copies of which are attached hereto, marked Exhibits 2 and 3, and by reference made a part hereof.

Wherefore, having fully answered, defendants pray that plaintiffs take nothing by their complaint, and that the defendants have judgment for their costs herein expended.

SMITH, BOONE & RIMEL,

/s/ RUSSELL E. SMITH,

Attorneys for Defendant.

State of Montana,
County of Missoula—ss.

Russell E. Smith, being first duly sworn, on his oath deposes and says: That he is one of the attorneys for the defendants in the above-entitled action,

and makes this verification for and on behalf of the defendants, for the reason that there is no officer or agents of said defendant corporations within the County of Missoula, State of Montana, wherein affiant resides and maintains his office; that affiant has read the foregoing Answer and knows the contents thereof, and that the matters, facts and things therein stated are true to his best knowledge, information and belief.

/s/ RUSSELL E. SMITH.

Subscribed and Sworn to before me this 14th day of March, 1952.

[Seal] /s/ MARTHA ALSTEENS,
Notary Public for the State of Montana, residing
at Missoula, Montana.

My Commission expires June 5, 1954.

EXHIBIT 2

Alex Shulman Co.
Somers, Montana

Seattle, Washington
January 9, 1951

Mr. Harry Noel,
General Adjustment Bureau,
601 Montana Building,
Missoula, Montana.

Dear Mr. Noel:

Enclosed please find list of machinery and material destroyed by fire about 2 a.m. January 2, 1951, in Darby Sawmill located at Conner, Montana.

We have been informed by our dismantling and moving contractor, Mr. H. Hunt of Spokane, Washington, that all of the items listed were damaged by the fire to such an extent that their only present value is as scrap.

We have assembled the information on the enclosed list from the following sources:

1. Appraisal made for Darby Mills, Inc., by Harper, Chambers & Bean on July 1, 1950.

2. Preliminary inventory taken by the writer and Mr. Joe Kraft on December 16, 1950, the day after completion of purchase.

3. Deducting from item 2, above, all of the machinery and materials which had been sold and delivered prior to January 2, 1951, or which had been moved to our warehouse at Somers, Montana.

We shall be glad to furnish any further information required. Your early attention will be greatly appreciated.

Very truly yours,

ALEX SHULMAN CO.

/s/ ALEX SHULMAN.

as r

1. 1 Wash. Iron Works 100 HP Steam Engine with Twin Cylinders 11x14 (formerly used to drive entire mill except carriage).

2. 1 Soule Steam Engine (formerly used to drive carriage only).

3. 150' Log Haul Chain.

4. 1 Log Haul Drive.

5. 1 M & C Engine for Log Haul Drive.

6. 1 Steel Drum 26" long; 13" diameter; with 32" gear and 2 15/16" shaft.

7. 1 Drag Saw with Steam operated Engine.

8. 1 set Saw Husks, Top Saw and Bottom Saw; each with 2 15/16" Arbor, 7' long, 6" collar; Ball Bearings.

9. 1 Hand Cross-Cut Saw.

10. Steam driven Log Nigger.

11. Steam Compressor (for Log Nigger).

12. 1 Hydraulic Cylinder (formerly used for Log Loader & Log Nigger).

13. 1 Hydraulic Cylinder (recently overhauled, for use as spare).

14. 1 set Refuse Chain Driver Gears.

15. 1 7 1/2 size Deane Steam Pump.

16. 30' 18" H/D Endless Belt.

17. 1 lot Pulleys, Shafting, Boxing, Belting, Gears, etc.

18. 1 lot Miscellaneous unlisted small items.

19. 1 lot Pipe:

234' 1 1/2"

187' 1"

60' 2"

41' 2 1/2"

65' 3"

108' 4"

Receipt of copy acknowledged.

[Endorsed]: Filed March 17, 1952.

[Title of District Court and Cause.]

VERDICT

I.

Did Darby Mills, acting through J. Ward Rukgaber, request James Jenkins as agent of the defendant companies to agree to a transfer of the insurance covering the saw mill machinery and equipment to Alex Shulman?

Answer: Yes.

II.

If your answer to the above question is Yes, then answer the following question:

Did James Jenkins agree to the transfer of the insurance to Alex Shulman?

Answer: Yes.

III.

If your answer to each of the above questions is Yes, then answer the following question:

What was the actual cash value of the machinery and equipment destroyed in the fire?

Answer: \$2,791.15.

/s/ DONALD D. FORNUM,
Foreman.

[Endorsed]: Filed March 26, 1952.

In the District Court of the United States for the
District of Montana, Missoula Division
No. 566

DARBY MILLS, INC., a Corporation, and ALEX
SHULMAN, Doing Business as ALEX SHUL-
MAN CO.,

Plaintiff,

vs.

ATLAS ASSURANCE COMPANY, LTD., a Cor-
poration, AETNA INSURANCE COMPANY,
a Corporation, NEW HAMPSHIRE FIRE
INSURANCE COMPANY, a Corporation,
THE HOME INSURANCE COMPANY, a
Corporation, PROVIDENCE WASHINGTON
INSURANCE COMPANY, a Corporation, NA-
TIONAL UNION FIRE INSURANCE COM-
PANY, a Corporation, and NIAGARA FIRE
INSURANCE COMPANY, a Corporation,
Defendants.

JUDGMENT

The above-entitled cause came on for trial before the Court, sitting with a jury, at Missoula, Montana, on March 24, 1952, at 10:00 o'clock a.m. The Plaintiffs were represented by their counsel, Messrs. Walchli, Korn and Warden of Kalispell, Montana, and Murphy, Garlington and Pauly of Missoula, Montana; the Defendants were represented by their counsel, Messrs. Smith, Boone and Rimel of Missoula, Montana. After the jury was duly empanelled and sworn, witnesses were sworn and evidence was introduced on behalf of the Plaintiffs and the Defendants. At the close of the evidence, the Defend-

ants moved the Court for an Order directed a verdict in favor of the Defendants and against each of the Plaintiffs, which Motion was by the Court granted as to the Plaintiff Darby Mills, Inc., and reserved for later decision as to the Plaintiff Alex Shulman.

The Court, with consent of counsel, submitted the cause to the jury for decision by a special verdict, in the form of the following written interrogatories, to which the jury made the following answers:

(1) Did Darby Mills, Inc., acting through J. Ward Rukgaber, request James Jenkin, as agent of the Defendant insurance companies, to agree to a transfer of the insurance covering the sawmill machinery and equipment to Alex Shulman?

Answer: Yes.

(2) If your answer to the above interrogatory is yes, then answer the following: Did James Jenkin agree to the transfer of this insurance to Alex Shulman?

Answer: Yes.

(3) If your answer to each of the above interrogatories is yes, then answer the following: What was the actual cash value of the machinery and equipment destroyed in the fire?

Answer: \$2,791.15.

In submitting the cause to the jury upon the foregoing interrogatories, the Court gave additional explanation and instruction, to which counsel took no exception. After argument of counsel and instruction by the Court, the jury retired to deliberate upon its verdict, and thereafter rendered its verdict as hereinabove set forth.

Now, Therefore, being fully advised in the premises, the Court hereby orders and renders judgment in the above-entitled cause in favor of the Plaintiff Alex Shulman and against the Defendants separately as hereinafter set forth, including Plaintiff's costs of action, which are fixed and taxed in the sum of \$159.30, making a total judgment in favor of the Plaintiff in the sum of \$2,950.45.

It Is Further Ordered and Adjudged, that the said judgment be, and the same is, apportioned between said Defendants in the separate amounts hereinafter set forth, in proportion to their respective shares of the total insurance coverage as determined by the allegations in the Plaintiffs' Complaint and the admissions in the Defendants Answer thereto, to wit:

Atlas Assurance Company, Ltd.....	\$560.92
Aetna Insurance Company.....	560.92
New Hampshire Fire Insurance Company..	560.92
The Home Insurance Company.....	560.92
Providence Washington Insurance Company	235.59
National Union Fire Insurance Company...	235.59
Niagara Fire Insurance Company.....	235.59
<hr/>	
Total	\$2,950.45

Done in Open Court this 2nd day of April, 1952.

/s/ WILLIAM D. MURRAY,
Judge.

[Endorsed]: Filed April 2, 1952.

Entered and Docketed April 3, 1952.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated between the parties hereto that all of the policies of insurance written by the separate defendants in this cause are identical in form and substance except for the names of the companies and the amounts of insurance involved, and that Plaintiffs' Exhibit No. 4, which is designated as a part of the record on appeal, contains exactly the same terms as all of the policies involved in this case.

Dated this 12th day of August, 1952.

SMITH, BOONE & RIMEL,
Attorney for Defendants-
Appellants.

WALCHLI, KORN &
WARDEN,

MURPHY, GARLINGTON
& PAULEY,
Attorney for Plaintiffs-
Appellees.

PLAINTIFFS' EXHIBIT No. 4

No. 1070

Stock Company

Renewal of No. 1054

The Home Insurance Company

New York

New York

Organized 1853

Member of the Underwriters Board of the Pacific

Amount: \$5,000.00.

Rate: 9.094.

Premium: \$454.70.

Total Premium: \$454.70.

Extended Coverage:*

Rate:

Premium: \$

*No insurance attaches in connection with Extended Coverage Perils unless "Rate" and "Premium" is specified above and Extended Coverage endorsement is attached to this policy.

In Consideration of the Provisions and Stipulations herein or added hereto and of Four Hundred Fifty-four and 70/100 Dollars Premium this company, for the term of One Year from the 28th day of January, 1950, to the 28th day of January, 1951, at noon, Standard Time, at location of property involved, to the amount not exceeding Five Thousand and no/100 Dollars, does insure Darby Mills, Inc., and legal representatives, to the extent of the

Plaintiffs' Exhibit No. 4—(Continued)

actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all Direct Loss by Fire, Lightning and by Removal From Premises Endangered by the Perils Insured Against in This Policy, Except as Hereinafter Provided, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not

Plaintiffs' Exhibit No. 4—(Continued)

be valid unless countersigned by the duly authorized Agent of this Company at Missoula, Mont. 17075-72.

/s/ HAROLD V. SMITH,
President.

/s/ W. BEYER,
Secretary.

Countersigned this 28th day of January, 1950.

URTON CO.

By /s/ J. G. JENKIN,
Agent.

Concealment, fraud.

This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property.

This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included.

This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately

Plaintiffs' Exhibit No. 4—(Continued)
impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other Insurance.

Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects.

Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Plaintiffs' Exhibit No. 4—(Continued)

Added provisions.

The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions.

No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy.

This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Plaintiffs' Exhibit No. 4—(Continued)

Mortgagee interests and obligations.

If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability.

This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs.

The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the dam-

Plaintiffs' Exhibit No. 4—(Continued)

aged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examina-

Plaintiffs' Exhibit No. 4—(Continued)

tion all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal.

In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options.

It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or re-

Plaintiffs' Exhibit No. 4—(Continued)

place the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment.

There can be no abandonment to this Company of any property.

When loss payable.

The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit.

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation.

This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

Standard Forms Bureau Form 78-B (April 1948)

Not for California

Attached to and forming part of Policy No. 1070 of the (Name of insurance company) Home Insur-

Plaintiffs' Exhibit No. 4—(Continued)

ance Company. Issued to (Name of insured) Darby Mills, Inc. The property covered hereunder is used principally as (Describe principal occupancy) Saw Mill, Planer Buildings, Equipment and Stock. Agency at (City or town or state) Missoula, Montana, Dated January 28, 1950. This policy covers the following described property, all situated Conner, Montana, and Darby, Montana.

See insuring clause below.

This policy being for \$5,000.00 covers its pro rata proportion, namely 5,000.00/48,000ths of each of the amounts specified and inserted in the blanks immediately proceeding the following items.

Item No.	Description or Location	Building	Furniture-Fixtures-Machinery-Equipment	Stock
Conner, Montana (West Fork)				
1.	Sawmill	\$ 2,000.00	\$12,500.00	
2.	Blacksmith Shop (Frame)..	25.00	150.00	
3.	Machine Shop (Frame)	1,500.00	1,000.00	\$700.00
4.	Oil House (Frame).....	100.00		125.00
5.	Bunkhouse (Frame- Brick Ch.)	1,000.00		
6.	Bunkhouse (Same as No. 5)..	300.00		
7.	Bunkhouse (Same as No. 5)..	300.00		
8.	Cook House (Frame- S. P. Ch.)	2,000.00	400.00	
9.	Shed and Garage (Frame)..	500.00		
10.	Dwelling (Frame-Brick Ch.)	2,400.00		
11.	Dwelling (Frame-S. P. Ch.)	1,200.00		
12.	Dwelling (Frame-Brick Ch.)	1,200.00		
Darby, Montana				
1.	Planer (Frame)	\$ 5,000.00	\$15,000.00	
2.	Office (Frame)	300.00	300.00	
Totals		\$17,825.00	\$29,350.00	\$825.00

Plaintiffs' Exhibit No. 4—(Continued)

Paragraph

No.

1. Insurance attaches hereinunder only to those items for which an amount is shown in the space provided therefor and not exceeding said amount under such item(s). For definition of terms "Building," "Equipment," "Stock," see paragraph 2 below; for extensions and exclusions see paragraphs Nos. 3 and 5 below.

2. Definition of Terms:

(I) Building: Building or structure in its entirety, including all fixtures and machinery used for the service of the building itself, provided such fixtures and machinery are contained in or attached to and constitute a part of the building; additions in contact therewith; platforms, chutes, conveyors, bridges, trestles, canopies, gangways, and similar exterior structures attached thereto and located on the above described premises, provided that if the same connect with any other building or structure owned by the named Insured, then this insurance shall cover only such portion of the same situate on the above described premises as lies between the building covered under this policy and a point midway between it and such other building or structure; also (a) awnings, signs, door and window shades and screen, storm doors and storm windows; (b) cleaning and fire fighting apparatus; (c) janitors' supplies, tools and implements; (d) materials and supplies intended for use in construction, alterations or repairs of the building. Provided, how-

Plaintiffs' Exhibit No. 4—(Continued)

ever, that property described in (a), (b), (c) and (d) immediately above must be, at the time of any loss, (1) the property of the named Insured who is the owner of the building; and (2) used for the maintenance or service of the building; and (3) contained in or attached to the building; and (4) not specifically covered under an item other than the "Building" item of this or any other policy.

(II) Equipment: Equipment and personal property of every description, and, provided the described building is not owned by the named Insured, "Tenant's Improvements and Betterments" installed or paid for by the named Insured; but excluding, (1) bullion, manuscripts, and machine shop or foundry patterns, (2) property (whether covered under this policy or not) included within the description or definition of "Stock," (3) property kept for sale, and (4) property covered under the "Building" item of this or any other policy.

(III) Stock: Stock of goods, wares and merchandise of every description, manufactured, unmanufactured, or in process of manufacture; materials and supplies which enter into the manufacture, packing, handling, shipping and sale of same; advertising material; all being the property of the named Insured, or sold but not removed (it being understood that the actual cash value of stock sold but not removed shall be the Insured's selling price); and the Insured's interest in materials, labor and charges furnished, performed on or incurred in connection with the property of others.

Plaintiffs' Exhibit No. 4—(Continued)

†3. Extension Clause: Personal property of the kind and nature covered under any item hereof shall be covered under the respective item (a) while in, on, or under sidewalks, streets, platforms, alleyways or open spaces, provided such property is located within 50 feet of the described "Building," and (b) while in or on cars and vehicles within 300 feet of the described "Building," and (c) while in or on barges and scows or other vessels within 100 feet of the described premises; provided such property is not covered by marine, inland marine or transportation insurance of any kind.

†Note:—When insurance under this form is "Blanket," the word "Building" in Paragraph 3 above shall be changed to "premises."

4. Trust and Commission Clause: To the extent that the named Insured shall be liable by law for loss thereto or shall prior to loss have specifically assumed liability therefor, any item of this policy covering on personal property shall also cover property of the kind and nature described in such item, at the location(s) herein indicated, held in trust, or on consignment or commission, or on joint account with others, or left for storage or repairs.

5. Exclusion Clause: In addition to property expressly excluded from coverage by any provision of this form or other endorsement attached to this policy, the following are not covered under any item of this policy and are to be excluded in the application of any "Average Clause" or "Distribu-

Plaintiffs' Exhibit No. 4—(Continued)

tion Clause": land values, gardens, trees, lawns, plants, shrubbery, accounts, bills, currency, deeds, evidences of debt, money, securities, aircraft, boats, motor vehicles.

6. Loss, if any, under each item of this policy shall be adjusted with and payable to the Insured specifically named herein unless otherwise agreed in writing by this Company.

7. Loss, if any, under item(s).....subject to all the terms and conditions of this policy, and to the written agreement, if any, between this Insurer and the following named Payee, is payable to Assured.

8. Average Clause (This Clause Void Unless Percentage Is Inserted): In event of loss to property described in any item of this policy as to which item a percentage figure is inserted in this clause, this Company shall be liable for no greater proportion of such loss than the amount of insurance specified in such item bears to the following percentage of the actual value of the property described in such item at the time of loss, nor for more than the proportion which the amount of insurance specified in such item bears to the total insurance on the property described in such item at the time of loss:

.....per cent (...%) applying to Item No.....

.....per cent (...%) applying to Item No.....

.....per cent (...%) applying to Item No.....

If this policy be divided into two or more items, the

Plaintiffs' Exhibit No. 4—(Continued)
foregoing conditions shall apply to each item separately.

The Provisions Printed on the Back of This Form Are Hereby Referred to and Made a Part Hereof.

URTON CO.

By /s/ J. G. JENKIN,
Agent's Signature.

This form may be used for "Blanket" Insurance or for "Specific" Insurance.

78-B April, 1948

Provisions Referred to in and Made Part of
This Form (No. 78-B)

Paragraph
No.

9. Waiver of Inventory and Appraisalment Clause: If any item of this policy is subject to the conditions of the Average Clause (Paragraph 8 hereof), it is also provided that when an aggregate claim for any loss to the property described in any such item of this policy is both less than Five Thousand Dollars (\$5,000.00) and less than two per cent (2%) of the total amount of insurance upon the property described in such item at the time such loss occurs, it shall not be necessary for the Insured to make a special inventory or appraisalment of the undamaged property, but nothing herein contained shall operate to waive the application of the Average Clause to any such loss.

If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately.

Plaintiffs' Exhibit No. 4—(Continued)

10. Excess Insurance Limitation Clauses: (I) (Applies when the insurance under this form is "Blanket.") No item of this policy shall attach to or become insurance upon any property, included within the description of such item, of others than the named Insured, which at the time of any loss is covered by insurance carried by or in the name of others, until the liability of such other insurance has first been exhausted, and shall then cover only the excess of value of such property over and above the amount payable under such other insurance, whether collectible or not. This clause shall not be applicable to property of others, for the loss of which the Insured named herein is liable by law or has prior to any loss specifically assumed liability.

(II) (Applies when the insurance under this form is "Specific.") No item of this policy shall attach to or become insurance upon any property, included within the description of such item, which at the time of any loss

(a) Is more specifically described and covered under another item of this policy, or under any other policy carried by or in the name of the Insured named herein, or

(b) Being the property of others is covered by insurance carried by or in the name of others than the Insured named herein, until the liability of insurance described under (a) or (b) has first been exhausted, and shall then cover only the excess of value of such property over and above the amount

Plaintiffs' Exhibit No. 4—(Continued)

payable under such other insurance, whether collectible or not. This clause shall not be applicable to property of others for the loss of which the Insured named herein is liable by law or has prior to any loss specifically assumed liability.

11. Tenant's Improvements and Betterments Clause: "Tenant's Improvements and Betterments" (subject to the provisions of the paragraph hereof entitled "Equipment") are covered as property of the named Insured under the "Equipment" item of this policy, regardless of whether or not the same have or will become a permanent or integral part of the buildings(s) or the property of the building owner or lessor. The amount of loss on such "Tenant's Improvements and Betterments" shall be determined on the basis of the actual cash value thereof at the time of loss, irrespective of any limitation upon the interest of the Insured therein resulting from any lease or rental agreement affecting the same. The insurance on such "Tenant's Improvements and Betterments" shall not be prejudiced, nor shall the amount recoverable for loss thereon be diminished, because of insurance covering on the same issued in the name of the owner of said building(s) or of others than the Insured named in this policy. This policy, however, shall not contribute to the payment of any loss to "Tenant's Improvements and Betterments" covered under any policy or policies issued in the name of the owner of said building(s) or of others than the Insured named in this policy.

Plaintiffs' Exhibit No. 4—(Continued)

12. Consequential Damage Assumption Clause: (To apply only if stock of merchandise, provisions or supplies in cold storage, which stock is subject to damage through change of temperature, are covered hereunder.) This Company (subject to the terms of this policy) shall be liable for consequential loss to stock of merchandise, provisions and supplies in cold storage covered hereunder caused by change of temperature resulting from total or partial destruction by any peril insured against in this policy, of refrigerating or cooling apparatus, connections or supply pipes thereof, unless such loss is specifically excluded as to any such peril by express provision of any form, rider or endorsement attached to this policy.

The total liability for loss caused by any peril insured against in this policy and by such consequential loss, either separately or together, shall in no case exceed the total amount of this policy in effect at the time of loss. If there is other insurance upon the property damaged covering the perils, or any thereof, which are insured against in this policy, this Company shall be liable only for such proportion of any consequential loss as the amount hereby insured bears to the whole amount of insurance thereon whether such other insurance covers against consequential loss or not.

13. Breach of Warranty Clause: If a breach of any warranty or condition contained in any rider attached to or made a part of this policy shall occur, which breach by the terms of such warranty or condition shall operate to suspend or avoid this

Plaintiffs' Exhibit No. 4—(Continued)

insurance, it is agreed that such suspension or avoidance due to such breach, shall be effective only during the continuance of such breach and then only as to the building, fire division, contents therein, or other separate location to which such warranty or condition has reference and in respect of which such breach occurs.

14. Subrogation Waiver Clause: This insurance shall not be prejudiced by agreement made by the named Insured releasing or waiving this Company's right of subrogation against third parties responsible for the loss, under the following circumstances only:

(I) If made before loss has occurred, such agreement may run in favor of any third party;

(II) If made after loss has occurred, such agreement may run only in favor of a third party falling within one of the following categories at the time of loss:

(a) A third party insured under this policy; or

(b) A corporation, firm, or entity (1) owned or controlled by the named Insured or in which the named Insured owns capital stock or other proprietary interest, or (2) owning or controlling the named Insured or owning or controlling capital stock or other proprietary interest in the named Insured;

(III) Whether made before or after loss has occurred, such agreement must include a release or waiver of the entire right of recovery of the named Insured against such third party.

Plaintiffs' Exhibit No. 4—(Continued)

15. Automatic Reinstatement Clauses: (a) Applying to losses not exceeding One Hundred Dollars (\$100.00) under this policy: The amount of insurance hereunder involved in a loss payment of not more than One Hundred Dollars (\$100.00) for this policy shall be automatically reinstated.

(b) Applying to losses in excess of One Hundred Dollars (\$100.00) under this policy: In the event of any loss payment under this policy in excess of One Hundred Dollars (\$100.00) the amount paid shall be deemed reinstated and this policy automatically reinstated to the full amount in force immediately preceding said loss, provided that the policy shall be endorsed to that effect within 30 days after the payment of loss, and the Insured shall pay to the Company the pro rata premium for the unexpired time from the date of said loss to the expiration of this policy, at the rate in force at the time of said reinstatement. This clause shall apply to each loss separately.

16. Vacancy—Unoccupancy—Cessation of Operations Clause: Unless otherwise specified by endorsement added hereto: (a) If the subject of this insurance be a manufacturing, mill, or mining plant, permission is granted to remain vacant or unoccupied or to shut down and cease operations, for a period of not to exceed sixty (60) consecutive days at any one time; or (b) If the subject of insurance be a cannery, fruit, nut or vegetable packing or processing plant, fish reduction plant, hop kiln, rice drier, beet sugar factory, cotton gin, cotton

Plaintiffs' Exhibit No. 4—(Continued)

compress or cotton seed oil mill, permission is granted to remain vacant or unoccupied for a period of not to exceed sixty (60) consecutive days at any one time, or to shut down and cease operations (but not to be vacant) for a period of not to exceed ten (10) months at any one time; (c) Except as otherwise provided in (a) and (b) immediately above, permission is granted to remain vacant or unoccupied without limit of time. Nothing herein contained shall be construed to abrogate or modify any provision or warranty of this policy requiring (1) the maintenance of watchman service; (2) the maintenance of all fire extinguishing appliances and apparatus including sprinkler system, and water supply therefor, and fire detecting systems, in complete working order; nor to extend the term of this policy.

17. Permits and Agreements Clause: Permission granted: (a) For such use of the premises as is usual or incidental to the business conducted therein and for existing and increased hazards and for change in use or occupancy except as to any specific hazard, use, or occupancy prohibited by the express terms of this policy or by any endorsement thereto; (b) To keep and use all articles and materials usual and incidental to said business, in such quantities as the exigencies of the business require; (c) For the building(s) to be in course of construction, alteration or repair, all without limit of time but without extending the term of this policy, and to build additions thereto, and this

Plaintiffs' Exhibit No. 4—(Continued)

policy under its respective item(s) shall cover on or in such additions in contact with such building(s); but if any building herein described is protected by automatic sprinklers, this permit shall not be held to include the reconstruction or the enlargement of any building so protected, without the consent of this Company in writing. This permit does not waive or modify any of the terms or conditions of the Automatic Sprinkler Clause (if any) attached to this policy.

This insurance shall not be prejudiced: (1) By any act or neglect of the owner of the building if the Insured is not the owner thereof, or by any act or neglect of any occupant of the building (other than the named Insured), when such act or neglect of the owner or occupant is not within the control of the named Insured; (2) By failure of the named Insured to comply with any warranty or condition contained in any form, rider or endorsement attached to this policy with regard to any portion of the premises over which the named Insured has no control; nor ‡(3) shall any insurance hereunder on building(s) be prejudiced by any error in stating the name, number, street or location of such building(s).

‡Note:—When insurance under this form is “Blanket,” section (3) immediately above shall be changed to read as follows: nor (3) shall this insurance be prejudiced by any error in stating the name, number, street or location of any building(s) and contents covered hereunder.

Plaintiffs' Exhibit No. 4—(Continued)

18. Electrical Apparatus Clause: If electrical appliances or devices (including wiring) are covered under this policy, this Company shall not be liable for any electrical injury or disturbance to the said electrical appliances or devices (including wiring) caused by electrical currents artificially generated unless fire ensues, and if fire does ensue this Company shall be liable only for its proportion of loss caused by such ensuing fire.

Standard Forms Bureau Form 199-L (Jan. 1948)
Endorsement

Attached to and forming part of Policy No. 1070 of the (name of insurance company) The Home Insurance Company.

Agency at (city or town and state): Missoula, Montana. Dated November 3, 1950.

Issued to (give insured's name and mailing address): Darby Mills, Inc.

Property Insured: Various. (State whether building, machinery, or stock, and whether coverage is specific or blanket. If specific give amount(s) and rate(s) applying to each item. Be sure to indicate percentage of average clause (if any).)

S.F.B. Form No.:

Is E.C.E. att'd? (yes or no):

Average Clause%

Location of Property: Conner, Montana.

City or Town, Conner. County, Ravalli. State, Montana.

Plaintiffs' Exhibit No. 4—(Continued)

Map Sheet..... Block..... Street No.....

Special Rate Page..... Line.....

Full Term Premium \$.....

If risk is not specifically rated or not shown on Sanborn Map, give construction and occupancy of building and indicate all exposures and deficiencies:

.....

Commencement of Policy: Jan. 28, 1950.

Expiration of Policy: Jan. 28, 1951.

Effective Date of This Endorsement: Nov. 3, 1950.

Amount Insured: \$5,000.00.

Old Rate: Fire, 6.287; E.C.E.....

New Rate: 6.287.

Additional Premium: Fire.....; E.C.E.....

Return Premium:

It is understood and agreed that the limits of liability under this policy is amended to read as follows:

Being for \$5,000.00, its pro rata proportion, namely $5,000/26,300$ ths of each of the amounts specified and inserted in the blanks immediately proceeding the items on form attached, except Item No. 12, which is hereby deleted from coverage due to fire of March 20, 1950, which was total loss.

All other terms and conditions of this policy remain unchanged.

URTON COMPANY.

By /s/ HARRY URTON,

Agent (Agent's signature).

Plaintiffs' Exhibit No. 4—(Continued)

Standard Forms Bureau Form 199-S (Jan. 1948)

Endorsement

Attached to and forming part of Policy No. 1070 of the (name of insurance company): Home Insurance Company.

Agency at (city or town and state): Missoula, Montana. Dated April 1, 1950.

Issued to (give insured's name and mailing address): Darby Mills, Inc.

Property Insured: Sawmill and Planer, all property form. (State whether building, machinery, or stock, and whether coverage is specific or blanket. If specific give amount(s) and rate(s) applying to each item. Be sure to indicate percentage of average clause (if any).)

S.F.B. Form No.:

Is E.C.E. att'd? (yes or no):

Average Clause%

Location of Property: Conner, Montana, and Darby, Montana.

City or Town, Conner & Darby. County, State, Montana.

Map Sheet. Block. Street No.

Special Rate Page. Line.

Full Term Premium \$.

If risk is not specifically rated or not shown on Sanborn Map, give construction and occupancy of building and indicate all exposures and deficiencies:

Plaintiffs' Exhibit No. 4—(Continued)

Commencement of Policy: 1/28/50.

Expiration of Policy: 1/28/51.

Effective Date of This Endorsement: 1/28/50.

Amount Insured: \$5,000.00.

Old Rate: Fire, 9.094; E.C.E.....

New Rate: 6.287.

Additional Premium: Fire.....; E.C.E.....

Return Premium: \$140.35.

In consideration of a Return Premium of \$140.35, it is hereby understood and agreed that the Planer at Darby, Montana, is eliminated from the coverage under this policy, and said policy amended to cover as per Form 78B attached, effective January 28, 1950.

All other terms and conditions of this policy remain unchanged.

URTON CO.

By /s/ J. G. JENKIN,

Agent (Agent's signature).

199-S—Jan. 1948.

Plaintiffs' Exhibit No. 4—(Continued)
Standard Forms Bureau Form 199-S (Jan. 1948)
Endorsement

Attached to and forming part of Policy No. 1070 of the (name of insurance company): Home Insurance Company.

Agency at (city or town and state): Missoula, Montana. Dated January 28, 1950.

Issued to (give insured's name and mailing address): Darby Mills, Inc.

Property Insured: Various. (State whether building, machinery, or stock, and whether coverage is specific or blanket. If specific.....give amount(s) and rate(s) applying to each item. Be sure to indicate percentage of average clause (if any).)

S.F.B. Form No.:

Is E.C.E. att'd? (yes or no):

Average Clause%

Location of Property: Conner, Montana.

City or Town, Conner. County..... State, Montana.

Map Sheet..... Block..... Street No.....

Special Rate Page..... Line.....

Full Term Premium \$.....

If risk is not specifically rated or not shown on Sanborn Map, give construction and occupancy of building and indicate all exposures and deficiencies:
.....

Plaintiffs' Exhibit No. 4—(Continued)

Commencement of Policy: 1/28/50.

Expiration of Policy: 1/28/51.

Effective Date of This Endorsement: 3/25/50.

Amount Insured: \$5,000.00.

Old Rate: Fire.....; E.C.E.....

New Rate:

Additional Premium: Fire, \$21.47; E.C.E.....

Return Premium:

It is hereby understood and agreed that the Effective Date of the new rates applying to this property should be March 25, 1950, in lieu of 1/28/50 as originally endorsed.

The return premium is \$118.88 in lieu of \$140.35, making an Additional Premium charge of \$21.47.

All other terms and conditions of this policy remain unchanged.

URTON CO.

By /s/ J. G. JENKIN,

Agent (Agent's signature).

199-S—Jan. 1948.

Standard Forms Bureau Form 78-B (April 1948)
Not for California

Attached to and forming part of Policy No. 1070 of the (Name of insurance company) Home Insurance Company.

Issued to (Name of insured) Darby Mills, Inc.

The property covered hereunder is used princi-

Plaintiffs' Exhibit No. 4—(Continued)

pally as (Describe principal occupancy) Saw Mill, Equipment & Stock & Buildings.

Agency at (City or town and state) Missoula, Montana.

Dated January 28, 1950.

This policy covers the following described property, all situated Conner, Montana.

See Insuring clause below

This policy being for \$5,000.00 covers its pro rata proportion, namely 5,000.00/27,500ths of each of the amounts specified and inserted in the blanks immediately proceeding the following items.

Item No.	Description or Location	Building	Furniture-Fixtures-Machinery-Equipment	Stock
Conner, Montana (West Fork)				
1.	Sawmill	\$ 2,000.00	\$12,500.00	
2.	Blacksmith Shop (Frame)..	125.00	150.00	
3.	Machine Shop (Frame)	1,500.00	1,000.00	\$700.00
4.	Oil House (Frame).....	100.00		125.00
5.	Bunkhouse (Frame- Brick Ch.)	1,000.00		
6.	Bunkhouse (Same as No. 5)..	300.00		
7.	Bunkhouse (Same as No. 5)..	300.00		
8.	Cook House (Frame- S. P. Ch.)	2,000.00	400.00	
9.	Shed and Garage (Frame)..	500.00		
10.	Dwelling (Frame-Brick Ch.)	2,400.00		
11.	Dwelling (Frame-S. P. Ch.)	1,200.00		
12.	Dwelling (Frame-Brick Ch.)	1,200.00		

Plaintiffs' Exhibit No. 4—(Continued)

[Paragraph Nos. 1 to 18, inclusive, identical to paragraphs 1 to 18 set out on pages 49 to 61 of this printed record.]

* * *

If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately.

The Provisions Printed on the Back of This Form Are Hereby Referred to and Made a Part Hereof.

URTON CO.

By /s/ J. G. JENKIN,

Agent (Agent's Signature).

78-B April 1948.

This form may be used for "Blanket" insurance or for "Specific" insurance.

Plaintiffs' Exhibit No. 4 admitted in evidence
March 24, 1952.

[Stipulation Endorsed]: Filed Aug. 13, 1952.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITH-
STANDING THE VERDICT

Come now the defendants, and each and all of them, in the above-entitled cause, and move the Court to set aside the verdict rendered by the jury in this action on the 26th day of March, 1952, and the judgment entered thereon on the 2nd day of

April, 1952, and to enter judgment in accordance with the Motion for a directed verdict made by the defendants, and each of them, at the close of all the evidence in the case.

This motion is made, and will be argued, upon all of the grounds urged by the defendants in support of their motions for a directed verdict, to wit:

1. That the insurance policies introduced in evidence by their terms provide that there may be no assignment of them without the written consent of the company, and likewise provide that no agent has any power to waive any provisions of said policies unless such waiver be given in writing.

2. That the evidence in this case specifically showed that the agent in question had no power to make any assignment of any interest in the fire insurance policies without the express consent of the defendants herein, and on the ground that there never was any express consent given by such defendants.

3. That the evidence fails to show that there ever was as between the plaintiff Darby Mills and the plaintiff Alex Shulman any transfer of any interest in the policies introduced in evidence.

Dated this 4th day of April, 1952.

SMITH, BOONE & RIMEL,

By /s/ RUSSELL P. SMITH,

Attorneys for the Defendants.

Service of Copy acknowledged.

[Endorsed]: Filed April 4, 1952.

[Title of District Court and Cause.]

ORDER

The defendants' motion for judgment notwithstanding the verdict having been presented to the Court on the 10th day of April, 1952, and briefs having been submitted by each of the parties, and the Court having considered the briefs submitted, and being fully advised in the premises,

It Is Therefore Ordered that the defendants' motion for judgment notwithstanding the verdict be and the same hereby is denied on the grounds and for the reasons as set forth in the Court's memorandum filed herewith.

It Is Further Ordered that the Clerk of this court forthwith notify the attorneys of record for the respective parties of the making of this order.

Done and dated this 16th day of July, 1952.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed July 16, 1952.

Entered and docketed July 17, 1952.

[Title of District Court and Cause.]

MEMORANDUM

This is an action by Darby Mills, Inc. and Alex Shulman to recover for the loss by fire of personal property covered by fire insurance policies issued by the seven defendant companies.

The policies of insurance were issued in the name of Darby Mills, Inc. and covered both real and personal property, which property was, at the time of the issuance of insurance, owned by Darby Mills. The property consisted of saw mill machinery and equipment and the buildings in which the machinery and equipment were located.

On December 15, 1950, by a written bill of sale and purchase agreement, Darby Mills conveyed all of the machinery and equipment to Alex Shulman, retaining the real property. In this transaction Darby Mills was represented by Mr. Ward Rukgaber. Upon the execution of the bill of sale and purchase agreement, a discussion was had between Mr. Rukgaber and Mr. Shulman relative to the fire insurance coverage, and it was agreed between them that Mr. Rukgaber would contact Urton & Co., the agent of defendants, to determine whether it could be arranged to have the existing insurance cover Alex Shulman as well as Darby Mills during the time Shulman was dismantling and removing the equipment. The evidence shows and the jury found that pursuant to the agreement between Rukgaber and Shulman that Rukgaber did contact Urton & Co. and obtain from that Company the

consent to the transfer of the insurance and a promise to prepare and forward to Darby Mills the necessary endorsements to effect the change. This agreement by Urton & Co. was made known to Mr. Shulman. However, the endorsements were never prepared.

Thereafter, on January 2, 1952, a fire occurred which destroyed the insured property. Claims were made by Darby Mills and Alex Shulman. The defendant companies paid the loss on the real property to Darby Mills without question, but declined the claim of Shulman for the loss of the personal property on the ground that there had been no consent in writing of the defendant companies to the transfer of the insurance, and this suit resulted. Defendants in their answer pleaded the lack of the consent in writing to the transfer of the insurance, and also that plaintiffs failed to furnish proofs of loss within the time required by the policies.

During the course of the trial motion for non-suit against plaintiff Darby Mills was granted because it appeared from the evidence that Darby Mills had no insurable interest in the personal property at the time of the fire, and the case was finally submitted to the jury upon the following special verdict:

“1. Did Darby Mills, acting through J. Ward Rukgaber, request James Jenkins, as agent of the defendant companies, to agree to a transfer of the insurance covering the saw

mill machinery and equipment to Alex Shulman?

“2. If your answer to the above question is Yes, then answer the following question: Did James Jenkins agree to the transfer of the insurance to Alex Shulman?

“3. If your answer to each of the above questions is Yes, then answer the following question: What was the actual cash value of the machinery and equipment destroyed in the fire?”

The jury answered the first two questions in the affirmative and fixed the amount of the damage, and defendants filed a motion for Judgment, notwithstanding the verdict, on the grounds:

I.

“That the insurance policies introduced in evidence by their terms provide that there may be no assignment of them without the written consent of the company, and likewise provide that no agent has any power to waive any provisions of said policies unless such waiver be given in writing.

II.

“That the evidence in this case specifically showed that the agent in question had no power to make any assignment of any interest in the fire insurance policies without the express consent of the defendants herein, and on the ground that there never was any express consent given by such defendants.

III.

“That the evidence fails to show that there ever was as between the plaintiff Darby Mills and the plaintiff Alex Shulman any transfer of any interest in the policies introduced in evidence.”

The determination of defendants' motion upon the first two grounds specified will be determinative of the motion upon the third ground, because had there been no policy provision requiring the consent of the companies to the assignment of the insurance, there would be no question that the conversation between Rukgaber, acting on behalf of Darby Mills, and Shulman, and their agreement with respect to the insurance which resulted in Rukgaber's requesting the consent of Urton & Co. to the transfer, would have constituted an oral assignment. The intent of Rukgaber to make the assignment was clear from the evidence, and that is the determining factor as to whether or not there was an assignment, aside from the policy provisions requiring consent of the insurers. 29 Am. Jur., Sec. 503; 45 C.J.S., Sec. 422. The non-delivery of the policies to Shulman upon the assignment to him is not significant, because both real and personal property was covered by the same policies, and Darby Mills, having retained the real property, was entitled to retain the policies covering that property, even though they had assigned the insurance insofar as it covered the personal property.

It likewise follows that if, as a matter of law, the consent to the transfer of the insurance, which

the jury found was given by Mr. Jenkins of Urton & Co., is binding on the defendant companies, the policy provision requiring consent of the companies to any assignment of insurance was complied with, and the oral assignment to Shulman was sufficient.

Therefore, the question which will be decisive of defendants' motion for judgment notwithstanding the verdict is whether, as a matter of law, the consent to the transfer of insurance, insofar as it covered personal property, which the jury found was given by Mr. Jenkin, was binding on defendant companies in the face of the following policy provisions:

“Assignment of this policy shall not be valid except with the written consent of the company.

“No permission affecting this insurance shall exist or waiver of any provision be valid, unless granted herein or expressed in writing added thereto.”

It is to be noted that there is no question that Jenkin at all times acted within his authority as a member of the firm of Urton & Co., that his acts were those of Urton & Co., and that anything Urton & Co. had authority to do with reference to these policies could be done by Jenkin.

The above policy provision with reference to waivers and permissions affecting the insurance, which is the same in all of the policies involved, is not of the type found in some policies restricting the right of agents to make waivers, but merely re-

quires that a waiver or permission affecting the insurance, by whomever made, must be in writing.

At first glance there appears to be a conflict in authority as to whether such provisions in insurance policies may be waived by parol. See 2 Couch Cyc. of Insurance Law, Sec. 522(f); 16 Appleman Insurance Law and Practice, Sec. 9214.

It seems settled, however, even by authorities recognizing parol waivers where the policy requires waivers to be in writing, that the person making the oral waiver must have authority to make written waivers, such as a general agent. 16 Appleman Insurance Law and Practice, Sec. 9213; *Alexander vs. Gen. Ins. Co. of America*, 22 Fed. Supp. 157. Thus, in order to determine whether the oral consent to the transfer of insurance given by Urton & Co. is binding upon defendant companies, it is necessary to determine the status of Urton & Co.'s agency for defendants.

In their brief defendants take issue with the Court for having referred to Urton & Co. throughout the trial as general agents. Paragraph IV of defendants' answer recites:

“Admit that the firm of Urton & Company at Missoula, Montana, was an agent for the insurance companies named in the complaint, and had power to receive applications and take risks for insurance, and to make out and endorse policies of insurance on property against loss by fire. Admit that said Urton & Company had power to collect and receive premiums. Admit that Urton & Company, as the agents

of the defendants, did issue the policies described in Paragraphs X to XVI of the complaint. Deny each and every allegation, matter and thing contained in Paragraph XVII of the complaint not herein specifically admitted, and specifically deny that Urton & Co. had power to make oral assignments of an interest in insurance policies.”

The admitted powers of Urton & Co. underlined above clearly establish Urton & Co. as a general agent under the definition of that term contained in 16 Appleman Ins. Law and Practice, Sec. 8691 and 2 Couch Cyc. of Ins. Law, Sec. 506 and 29 Am. Jur. Sec. 96. The specific denial contained at the end of the above quoted paragraph IV of the answer is merely a conclusion of law upon the very point the Court is now called upon to rule.

The evidence also establishes Urton & Company as general agents for the companies involved. The following appears in the testimony of Mr. Jenkin on cross-examination:

“Q. And the Urton Company is a general agent for the insurance companies, these insurance companies that are defendants in this action?”

“A. They are.”

The only limitation upon the authority of Urton & Co. with respect to saw mill risks shown by the evidence was a limitation with respect to the question of the risk itself. Once having obtained authority to take a saw mill risk on behalf of the com-

panies, it appears from the evidence that all the powers of a general agent resided in Urton & Co. They wrote the policies; they endorsed the policies and some of such endorsements were made as a result of correspondence between Darby Mills and Urton & Co., and all of the endorsements were prepared and forwarded to Darby Mills without Urton & Co. ever having possession of the policy at the time of the endorsements; they accepted the premiums; they changed the premiums by endorsement; they did everything that the company itself could do. The reason for the limitation upon their authority with respect to saw mill risks had only to do with the fact that saw mills are a more hazardous risk; it had nothing to do with the person insured. Once having ascertained that the companies were willing to go on a saw mill risk, Urton & Co. had the authority to decide on the risk with respect to the party to be insured, to write and endorse the policy, to collect premiums and so forth.

But aside from the question of whether the term "general agent" is appropriately applied to Urton & Co., the important question here is whether Urton & Co. had authority to make waivers with respect to the insurance. 2 Couch Cyc. of Ins. Law, Sec. 506. As noted previously, there is no denial of that authority to them by the terms of the policies, they did write the policies, they did endorse the policies, it is admitted in the answer that they did have authority to write and endorse policies of insurance. As a matter of fact, one of the insurance

policies which was introduced in evidence (Plaintiff's Ex. 5) issued by Atlas Assurance Co., Ltd. contains on the last page thereof a form of consent to the assignment of the policy for execution by an agent, all of which leads to the conclusion that Urton & Co., whether general agents or not, did have authority to make waivers with respect to this insurance in writing as provided by the policies. Finally, Mr. Jenkin further testified on cross-examination:

“Q. You have authority then Mr. Jenkin to not only accept applications for original insurance but also to make endorsements to meet changing conditions under the policy?”

“A. Yes.

“Q. Isn't it a fact that you make endorsements for purposes of indicating a change of interest in the property such as a sale under contract?”

“A. We do.”

The question remains, however, whether Urton & Co., having authority to make waivers in writing, also had authority to make a binding parol waiver. As noted before, there appears to be conflict of authority on this point. The Montana Supreme Court, so far as this Court can find, has never ruled upon that question. The case of Tuttle vs. Pacific Mut. Life Ins. Co., 190 Pac. 993, cited by defendants does not cover this point. In that case there was a provision in the policy against a waiver by an agent and it was upon that basis that the

Court decided the waiver question presented there, and the Court specifically declined to consider the question with which we are confronted in this case. The Court said:

“Where the policy contains provision against waiver by an agent, it is both notice to and agreement by the policy holder that no agent of the company has authority to waive the condition (Citing cases).

“Three letters, admittedly coming from the home office, were introduced and the material parts of their contents have been heretofore quoted. No one of these letters is signed as provided for in the policy; but we shall not pass upon the question as to whether such requirement is reasonable or not, as, in our opinion, nothing contained in the letters could constitute a waiver, even though signed.”

Defendants also cite two Montana Code Sections to the effect that transfer of a thing insured does not itself transfer the insurance (Sec. 40-409, R.C.M. 1947) and that transfer of interest in a thing insured, unaccompanied by a corresponding transfer of insurance, suspends the insurance (Sec. 40-213, R.C.M. 1947). The first section referred to has no application because as noted before, there is no question that, aside from the policy provision requiring consent of the companies to assignments of insurance, as between Darby Mills and Alex Shulman the insurance was transferred. The same observation may be made with regard to the other quoted section.

The next case cited by defendants, *St. Paul Fire & Marine Ins. Co. vs. Ruddy*, 299 Fed. 189, is likewise not in point. In that case the Court also specifically declined to rule upon the question under consideration here, saying at page 194:

“The policy provides that no authorized agent could waive the provisions thereof unless the waiver was endorsed on the policy; but a provision against waiver might be waived by those who had authority so to do. That question however is not material here.”

The cases of *Ray vs. Canton Cooperative Fire Insurance Co.*, 36 N.E.(2d) 639 N. Y., and *Morgan vs. American Cent. Ins. Co.*, 92 S.E. 84 (W.V.) also cited by defendants seem to swing upon the fact that the policies involved never were in the possession of the defendants, or their agents, and it was therefore impossible to endorse a waiver upon them. While the policies in the instant case also were not in the possession of *Urton & Co.*, there was no such necessity here because the evidence is clear that numerous endorsements were made to all of the policies by *Urton & Co.* without their ever having possession of the policies. It was a well established practice of *Urton & Co.*, with reference to these various policies, to make endorsements and forward them by mail to *Darby Mills* to be attached to the policies. The language of the Court in *Morgan vs. American Cent. Inc. Co.*, *supra*, indicates that under such circumstances the Court would have recognized the validity of the waiver. The Court said:

“If Hatfield had left his policy with the agent and he had agreed to endorse on it the written consent of his company to the transfer of it, the case would then have presented a question very similar to the Craft case (wherein a waiver was recognized), because he would then have agreed to do a thing which he had the power to do, and which he should have done instantly.”

The evidence here shows Urton & Co. had the power to make endorsements without possession of the policies, and in fact exercised that power on numerous prior occasions, and it should have done it instantly.

Defendants next case, *Aliff vs. Atlas Assurance Co.*, 135 S.E. 903 (W.V.) was decided on the question of the sufficiency of the plaintiff's statement or complaint in setting up the agreement relied upon as a waiver, but there the Court also recognized that a waiver may be made by parol. The Court said:

“We think this evidence was sufficient to establish an express agreement before loss to make the requisite endorsement on the policy to protect plaintiff's right. But was defendant given sufficient notice * * * in plaintiff's statement. We think not. The statement was only that the agent after receiving the policy retained it for an unreasonable time. * * * This was not sufficient. He must have agreed to bind the assurance company, and that an agent

may so bind the Company is well settled by authority, as well in law as in equity cases. (Citing cases).”

As to the cases of Bruce, et al. vs. American Cent. Ins. Co., 120 S.E. 13, and Bruce, et al. vs. Savannah Fire Ins. Co., 120 S.E. 19, both Georgia cases, the full facts of the cases did not appear in the report of the cases, as only the syllabi of the Court is reported in the Southeastern Reporter.

The case of Lett vs. Guardian Fire Ins. Co., 125 N. Y. 82, 25 N.E. 1088, holds that conveyance of insured property and an assignment of the policy conveys no interest in the insurance to the assignee by itself, and until the consent of the insurer was obtained the policy was a dead instrument in the hands of the assignee. However, the very question involved in this case is the validity of that consent which would breathe new life into the policies.

It thus appears that many of the authorities, seemingly holding that a parol waiver of a provision in an insurance policy which provides waivers must be in writing is not effective, are limited to the facts of the particular case; and some of the Courts so holding, specifically recognize that under other circumstances they would give effect to an oral waiver. Morgan vs. American Cent. Ins. Co., supra, Atliff vs. Atlas Assurance Co., supra, St. Paul Fire & Marine Ins. Co. vs. Ruddy, supra.

On the other hand, there are numerous authorities holding such oral waivers to be effective despite policy provisions requiring waivers to be in writing.

“An insurance agent, authorized to waive provisions of a policy, may do so orally, though the policy provides that a waiver must be endorsed thereon.”

16 Appleman Ins. Law and Practice, Sec. 9213:

“So, also, under our decisions no question exists as to the power and authority of a general agent to modify the insurance contract or waive a condition of a written fire insurance policy by parol. And this is true even though the policy contains a written stipulation to the contrary. (Citing cases).”

Lattner vs. Federal Union Ins. Co., 163 Pac. (2d) 389 (Kan.)

“It is well established that an insurance company may waive any contractual condition or restriction in a policy, even the condition that such a waiver must be in writing. Whether or not the director-agent in the instant case had specific or apparent authority to waive a condition is a question of fact. Such a waiver may be established by a course of conduct or by the word or deed of an agent acting within the scope of his real or apparent authority.”

Biloz vs. Tioga County Partons' Fire Relief Assn., 21 N.Y.S. 2d 643.

See also: 2 Couch Cyc. of Ins. Law, Sec. 522(f); 29 Am. Jur. “Insurance,” Secs. 803, 804, 820; *Maryland Casualty Co. vs. McTyier*, 150 Tenn. 691, 266 S. W. 767,

48 A.L.R. 1168; American Fire & Casualty Co. vs. Eastham, 185 Fed. (2d) 729 (Tex.); Anno. 38 A.L.R. 636; Bank of Anderson vs. Home Ins. Co., 111 Pac. 507 (Cal.); Collard vs. Universal Automobile Ins. Co., 45 Pac. (2d) 288 (Ida.); Saucier vs. Life & Casualty Ins. Co. of Tenn., 179 So. 851 (Miss.); Standard Accident Ins. Co. vs. Southwestern Trading Co., et al. 154 Fed. (2d) 259 (Tex.—CCA5); Home Insurance Company of N.Y. vs. Roberts, 100 S.W. 2d 91 (Tex.); 14 R.C.L. 1163.

The foregoing citations seem to represent the weight of authority, and in addition, they appeal to the Court as representing the sounder view. In this case, the policies involved are standard form policies. The evidence discloses that Urton & Co. wrote a considerable volume of fire insurance, and presumably much, if not all of such fire insurance was written on standard form policies containing the same provision with reference to written waivers as the policies involved here. Yet the evidence shows that the fire insurance business of Urton & Co. was not conducted in nearly as formal or technical a manner as the standard form of policy would seem to require. The evidence showed Urton & Co. customarily arranged for fire insurance coverage for their patrons by telephone, with coverage effective from the instant of the call, and in advance of the preparation of the written policy or the payment of the premium, and various changes in insurance coverage were customarily made in the same manner.

In addition, it is difficult to see where defendants were prejudiced in any way by the change in ownership. There was some evidence that a saw mill is a more than usual hazardous fire insurance risk. The evidence indicates, however, that such extra-hazard exists only with reference to operating saw mills, and the mill in question was not an operating saw mill, but was in the process of being dismantled. But, irrespective of whether this particular saw mill under the circumstances could be considered an extra-hazardous risk, the defendants had willingly assumed the risk—and presumably the premiums charged reflected any unusual risk—and it is difficult to see that this saw mill in the hands of Alex Shulman was any greater risk than the same saw mill in the hands of Darby Mills.

Finally, the evidence is undisputed that at no time prior to the fire, or after the fire up to the time of trial, did the defendants offer or make an effort to refund what would have been unearned premiums if the insurance policies became dead instruments at the time of the transfer, as defendants now maintain, and this despite the fact they knew of the transfer.

The Court holds, as a matter of law, that the oral consent by Mr. Jenkin to the transfer of the insurance, as found by the jury, is binding on the defendant companies.

In addition to the foregoing, it appears to the Court in this case that the defendant companies are estopped to deny the validity of the consent to the transfer of the insurance by Mr. Jenkin. The

evidence shows that Rukgaber, acting for Darby Mills, and Shulman, at the time the bill of sale to the property was executed, discussed the question of insurance; that they agreed as between themselves that Mr. Rukgaber would call on Urton & Co. to see about transferring the insurance, or modifying it so as to cover Shulman; that pursuant to said agreement, Rukgaber called on the Urton company and obtained from that company the oral consent to the transfer of the insurance, and an agreement to prepare endorsements effecting the change and forward them by mail; that such agreement by Urton & Co. was communicated to Mr. Shulman by Mr. Rukgaber, and relying on that agreement, Mr. Shulman took no further steps to protect himself by obtaining other insurance. Upon the principles and authority set forth in 45 C.J.S., Sec. 702, and cases therein cited, the Court finds that the defendants are estopped to set up the lack of the written endorsement to deny liability on their policies. See also 29 Am. Jur. "Insurance," Secs. 804, 832, et seq.; 16 Appleman Ins. Law and Practice, Secs. 9121, et seq., and cases cited.

For the above reasons, the motion of defendants for judgment notwithstanding the verdict is denied.

Dated this 16th day of July, 1952.

/s/ W. D. MURRAY,

United States District Judge.

[Endorsed]: Filed July 16, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendants, Atlas Assurance Company, Ltd., a Corporation, Aetna Insurance Company, a Corporation, The Home Insurance Company, a Corporation, Providence Washington Insurance Company, a Corporation, National Union Fire Insurance Company, a Corporation, and Niagara Fire Insurance Company, a Corporation, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 3rd day of April, 1952.

Dated this 12th day of August, 1952.

SMITH, BOONE & RIMEL,

RUSSELL E. SMITH,

W. T. BOONE,

By /s/ JACK W. RIMEL,

Attorneys for all of the above-
named Defendants.

[Endorsed]: Filed August 13, 1952.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which Appellants will rely on appeal are:

1. The Court erred in refusing to direct a verdict in favor of the defendants, and against the plaintiff, Alex Shulman, doing business as Alex Shulman Company, at the close of the plaintiffs' case.

2. The Court erred in refusing to direct a verdict in favor of the defendants, and against the plaintiff, Alex Shulman, doing business as Alex Shulman Co., at the close of all of the evidence.

3. The Court erred in refusing to direct a judgment for the defendants notwithstanding the verdict.

In connection with these points the defendants intend to rely upon the proposition that as a matter of law no valid judgment could be entered against the defendants because the insurance policies specifically provide that there could be no assignment of them without the written consent of the defendant companies, and that there was no such consent; that the policies specifically provide that no agent has the power to waive any provisions of the policies unless the waiver be given in writing, and that there was no such written waiver; that the evidence shows that the agent in this case had no power to make any assignment of any interest in

the fire policies in question without the express consent of the defendants, and that no such express consent was given; that the evidence fails to show that any interest in the insurance policies in question was assigned to the plaintiff, Alex Shulman by the plaintiff, Darby Mills.

Dated this 17th day of August, 1952.

/s/ RUSSELL E. SMITH,

/s/ W. T. BOONE,

/s JACK W. RIMEL,

Attorneys for Defendant-
Appellants.

Service of copy acknowledged.

[Endorsed]: Filed August 13, 1952.

In the United States District Court, District of
Montana, Missoula Division

No. 566

DARBY MILLS, INC., a Corporation, and ALEX
SHULMAN, Doing Business as ALEX SHUL-
MAN CO.,

Plaintiffs,

vs.

ATLAS ASSURANCE COMPANY, Ltd., a Corpo-
ration; AETNA INSURANCE COMPANY, a
Corporation; NEW HAMPSHIRE FIRE IN-
SURANCE COMPANY, a Corporation; THE
HOME INSURANCE COMPANY, a Corpo-
ration; PROVIDENCE WASHINGTON IN-
SURANCE COMPANY, a Corporation; NA-
TIONAL UNION FIRE INSURANCE
COMPANY, a Corporation; and NIAGARA
FIRE INSURANCE COMPANY, a Corpo-
ration,

Defendants.

PARTIAL TRANSCRIPT OF TESTIMONY

Be It Remembered, that the above cause came on
on regularly for trial on the 24th day of March,
1952, at Missoula, Montana, before the Hon. W. D.
Murray, United States District Judge for the Dis-
trict of Montana, sitting with a jury. The plain-
tiffs were represented by their counsel, Mr. J. C.
Garlington, of Missoula, Montana, and Mr. D. J.
Korn, of Kalispell, Montana; and the defendants

were represented by their counsel, Mr. Russell E. Smith and Mr. W. T. Boone, of Missoula, Montana.

Thereupon, the cause was tried, and the following is a partial transcript of the evidence presented at said trial:

WARD RUKGABER

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Garlington:

Q. Will you state your name, please?

Mr. Smith: At this time, may it please the Court, the defendants object to the introduction of any evidence on the ground the complaint of the plaintiffs herein fails to state a cause of action upon which relief may be granted.

The Court: Objection overruled.

A. Ward Rukgaber.

Q. Where do you live, Mr. Rukgaber?

A. Darby.

Q. How long have you lived at Darby?

A. Four years and a half.

Q. What is your business or occupation?

A. I am working in the office of Eden's Lumber Company.

Q. That company has no connection with this case one way or the other?

A. None whatever. [2*]

(Testimony of Ward Rukgaber.)

Q. It is not connected in any respect with Darby Mills? A. No.

Q. Were you formerly employed in any capacity by the plaintiff, Darby Mills, Incorporated?

A. Yes.

Q. When was that, Mr. Rukgaber?

A. From September, 1947, until August of 1951.

Q. In what capacity were you employed, what were your duties in a general way?

A. Treasurer and general manager.

Q. What type of business operation was being conducted during that period of time?

A. Sawmilling, planing, and surfacing lumber for shipment, a complete process.

Q. Were you the man who was on the ground and substantially in charge of that business then?

A. Yes.

Q. Who was the president of the Darby Mills?

A. Mr. H. R. Rukgaber.

Q. Is he a relative of yours?

A. He is a cousin.

Q. Where did he live? A. Toledo, Ohio.

Q. Was he the principal stockholder in the company? A. Yes. [3]

Q. Now, the subject matter of this case involves a sawmill being operated by the Darby Mills. Will you tell the jury where the sawmill was located?

A. The sawmill was on the West Fork of the Bitterroot River, about 13 miles from Darby, or five miles from Conner.

Q. Will you just describe it in a general way,

(Testimony of Ward Rukgaber.)

as to the type mill, its capacity, and what kind of equipment it had?

A. It was a steam operated mill, capacity, 30,000 feet per day, board feet.

Q. Was it operated by the Darby Mills, Incorporated?

A. Yes, we operated it up until the illness of the president.

Q. Did Darby Mills also operate a planer mill in a separate location? A. Yes.

Q. When was the sawmill operation discontinued? A. In the winter of 1949.

Q. And then do I understand that it lay idle from then until the winter of 1950?

A. That's right.

Q. Now, at the time that it was shut down in the winter of 1949, will you tell us whether it was in an operational and functioning condition?

A. It was.

Q. Did anything transpire prior to the fire to change that [4] condition, well, up until December 15, 1950? A. No.

Q. It remained in an operational and functional condition? A. Yes.

Q. Now, was a negotiation entered into to dispose of the sawmill by Darby Mills? A. Yes.

Q. And did that negotiation involve Mr. Alex Shulman here? A. Yes.

Q. When did that commence?

A. The last of November of 1950.

Q. Of 1950? A. Yes.

(Testimony of Ward Rukgaber.)

Q. And was an agreement negotiated for the sale of the sawmill machinery and equipment to Mr. Shulman? A. Yes.

Mr. Garlington: Your Honor, this Exhibit 1 is, was attached as an exhibit to the answer, but for the purposes of trial and ready reference here, it may be more convenient to have a separate document.

The Court: Very well.

Q. I hand you here a document marked Plaintiffs' Exhibit 1. I will ask you to examine it and state what it is?

A. This is a purchase agreement and bill of sale.

Q. Between whom? [5]

A. Between Alex Shulman Company and Darby Mills.

Q. This Exhibit 1 is the culmination of negotiations between Darby Mills and Shulman for the purchase of this sawmill machinery and equipment?

A. That's right.

Mr. Garlington: I wonder if it wouldn't be better to read this to the jury?

The Court: You better offer it, I think.

Mr. Smith: May I see it?

Mr. Garlington: We offer in evidence Plaintiffs' Exhibit 1.

The Court: Is there any objection?

Mr. Smith: No objection.

The Court: Very well, it may be admitted.

(Testimony of Ward Rukgaber.)

PLAINTIFFS' EXHIBIT No. 1

“Bill of Sale and Purchase Agreement

“This Indenture, entered into this 15th day of December, 1950, by and between Darby Mills, Inc., a Montana corporation having its principal Office at Darby, Montana, as party of the first part hereafter referred to as the Seller and Alex Shulman Co., a co-partnership consisting of Louis Schwartz, Harry Schwartz and Alex Shulman, doing business at Somers, Montana, as party of the second part hereafter referred to as the Buyer.

“Witnesseth, the Seller does hereby grant, bargain, sell and convey unto the Buyer and to its successors and assigns all saw mill machinery and equipment of whatsoever kind or nature now located at and used in connection with that certain saw mill belonging to the Seller at Conner, Montana, including in particular but without being limited or restricted to, each and all of the following items, to wit:

2 Skid Pans.

1 lot Log Chokers.

1 AC Tractor, Serial # HD-10W 3935, Motor # 47110222, equipped with 1 CU-1 single drum cable control unit, serial # 13091.

1 AC Tractor, serial # HD-10W 3942, motor # 47110219, equipped with 1 CU-1 single drum cable control unit and dozer blade.

1 1941 Dodge Pickup ½ ton truck bearing motor # 7156.

(Testimony of Ward Rukgaber.)

1 P & H Arc Welder, serial # 244803.

1 Blacksmith Forge.

1 lot Oil drums and grease in drums.

1 Log Haul Chain.

1 M & C Engine, belt & chain for log haul.

1 Steam drag cut-off saw.

1 American saw mill with 4 ft. block opening,
new carriage.

1 set ball-bearing saw husks & drum.

1 Refuse elevator and chain.

1 Ball bearing slash cut-off saw, frame & fittings.

1 Wash. Iron boiler—150# pressure.

1 Wright horizontal boiler—125# pressure.

1 American power feed 4-saw edger with 2 sets
saws.

1 Trimmer saw.

1 set roller casings.

1 Log nigger, check & engine.

1 set 100 h/p steam engine—11x14 cylinders.

340 feet Green chain, complete with shafting &
gears.

1 Twin-engine dynamo & engine—125 volt.

1 B T & B saw grinder.

1 71/2 size Deane steam pump.

5 2 ft. Saws.

4 4 ft. Saws.

1 lot Pulleys, shafting, boxing, belting, etc., to
run entire mill.

1 small steam turbine generator.

1 small steam engine—to run carriage.

6 Drag-saw blades.

“To have and to hold the same unto the Buyer,

(Testimony of Ward Rukgaber.)

its [7] successors and assigns forever; and the Seller does covenant and agree to and with the Buyer that the Seller is the lawful owner of all of the said property with full power and authority to sell the same, free and clear of all liens and encumbrances of whatsoever kind, nature and description.

“It is mutually understood and agreed that all of the aforementioned property shall be deemed to be delivered to the Buyer hereunder, concurrently with the execution hereof, and the Buyer shall have the right to dismantle said plant and remove all of the said equipment from said Saw Mill at Conner, Montana, within ninety days from and after the date hereof, unless prevented from so doing by causes beyond the control of the Buyer, in which event the Buyer will remove the same from said premises as soon thereafter as may be possible. All expenses incurred in dismantling said plant and removing said equipment shall be borne and fully discharged by the Buyer. In this connection, it is further understood and agreed that in order to remove the said equipment from said Saw Mill it may be necessary to remove certain wall sections and other portions of said Saw Mill building, and the Buyer shall not be required to replace the same but the Buyer shall, nevertheless, avoid causing any greater damage to said building than necessary in order to accomplish the removal of the said equipment.

“In full payment for all of said equipment the Buyer does hereby promise and agree to pay to the

(Testimony of Ward Rukgaber.)

Seller the total sum of \$6,750.00 of which amount the sum of \$3,375.00 has been paid to the Seller concurrently with the execution hereof, the receipt of which is hereby acknowledged by the Seller, and the balance thereof in the further sum of \$3,375.00 shall be payable to the Seller upon completion of the removal of all of the said equipment from said saw mill premises and in any event, not later than January 15, 1951.

“In witness whereof, the parties hereto have caused this indenture to be executed for and on their behalf by their representatives thereunto duly authorized the day and year hereinabove first written.

DARBY MILLS, INC.

By /s/ J. WARD RUKGABER,
Plant Manager & [8]
Treasurer.

ALEX SHULMAN CO.

By ALEX SHULMAN,
Co-Partner.”

Q. Now, Mr. Rukgaber, who did the negotiating for this agreement, Exhibit 1, on behalf of Darby Mills? A. The president of the corporation.

Q. How was it handled, just briefly?

A. By letter. A letter from Shulman Company came to us. We forwarded it on to him at Toledo for approval.

Q. He authorized the sale? A. Yes.

Q. Who participated in the preparation and signing of this Exhibit 1 contract?

(Testimony of Ward Rukgaber.)

A. I did.

Q. And Mr. Alex Shulman personally?

A. Yes.

Q. Where was that done?

A. In the office of Murphy, Garlington and Pauly.

Q. Here in Missoula?

A. Here in Missoula.

Q. Was the sawmill building itself sold and disposed of at this time? A. No.

Q. The sale referred entirely to the sawmill machinery and equipment? [9] A. Yes.

Q. Now, I call your attention to the list of items that are included in the Exhibit 1, and I just ask you generally whether you know if that list was a complete and detailed enumeration of all the things that were in the sawmill that were to be sold?

A. Not entirely, there are too many small items.

Q. This Exhibit 1 was intended to include at least the major items? A. Yes.

Q. Everything, however, large and small, was intended to be included in the sale? A. Yes.

Mr. Smith: We object to the introduction of any oral evidence intended to vary the terms of this writing, if that is the question.

The Court: What is the question, read the question?

(Question and answer read back by Reporter.)

Mr. Garlington: I would like to make a short statement.

(Testimony of Ward Rukgaber.)

The Court: Yes.

Mr. Garlington: In the first place, I think the question and answer do not depart from the terms of the document, because, beginning in the second line of the second paragraph, it says, "All sawmill machinery and equipment of whatsoever kind or nature, including but not limited to the [10] following." I wanted to make it clear to the jury what the extent of this list was.

The Court: Yes, the objection is denied.

Q. When was the Exhibit 1 signed, Mr. Rukgaber? A. December 15th, 1950.

Q. Where was it signed?

A. In Murphy, Garlington and Pauly's office in Missoula.

Q. Now, at that time and place, Mr. Rukgaber, was there any discussion between you and Mr. Shulman concerning the matter of insurance coverage on this property? A. Yes.

Mr. Smith: To which we object, your Honor, on the ground that the document appears to be a complete integration, and as such, it is the exclusive evidence of its terms. We object to the introduction of any evidence which has the effect of modifying or changing the terms of the agreement between the parties.

Court: The purpose is not to vary the terms of this agreement.

Mr. Garlington: That is the effect of the objection. I would like to be heard on this. It is our position that these people are strangers, and are

(Testimony of Ward Rukgaber.)

not in a position to raise the parol evidence rule.

Court: In any event, the purpose is not to vary the terms of this agreement. [11]

Mr. Garlington: We don't intend to contradict the agreement. The position we take is that there was a separate agreement concerning the subject of insurance coverage. I propose now to go into that subject.

Court: The objection is overruled.

Q. Will you state to the Court and jury, as best you can recall, what was said by you for Darby Mills and by Mr. Shulman concerning the matter of insurance protection and coverage on the sawmill machinery?

Mr. Smith: Just a minute. May it be understood our objection goes to this whole line of evidence?

Court: Yes, of course.

A. Mr. Shulman asked me if we carried insurance on the machinery. I told him we did. He said, "Could your insurance cover us while we are in the process of dismantling?" I told him I was not sure, but I would contact their agent and find out and advise him.

Q. Was anything discussed at that time concerning prorating and sharing the premium cost?

A. Mr. Shulman told me he would take care of any portion of the premium during the time he was removing the machinery.

Q. What statement, if any, did you make concerning the completion of those arrangements in connection with the insurance?

(Testimony of Ward Rukgaber.)

A. State that again? [12]

(Question read back by Reporter.)

Q. To Mr. Shulman?

A. I told him I would call on the agent and find out what could be done, if endorsements could be put in the policies to cover him.

Q. As between you and Mr. Shulman, who was to undertake that matter? A. I was.

Q. Now, in the capacity of treasurer and plant manager for Darby Mills, Incorporated, did you have anything to do, any responsibility concerning the insurance coverage and protection on the Darby Mills property? A. Yes.

Q. Did you keep yourself familiar with the insurance policies and insurance protection of the company's property? A. Yes.

Q. Was that true during the entire period of your employment by Darby Mills? A. Yes.

Q. Through what insurance agency was the insurance, the fire insurance on the Darby Mills property written?

A. The Urton agency here in Missoula.

Q. The Urton company here in Missoula?

A. In Missoula.

Q. Would that be true, then, during the years

(Testimony of Ward Rukgaber.)

1948, 1949 and [13] 1950? A. Yes.

Q. I hand you now an exhibit marked Plaintiff's Exhibit 2, and I will ask you to examine it, Mr. Rukgaber, and state generally, without stating its contents, what it is?

A. It is an insurance policy covering various equipment and buildings and properties at Conner.

Q. Whose properties? A. Darby Mills.

Q. By whom was it issued?

A. It was issued by the Urton company at Missoula.

Q. For what insurance company?

A. For the Aetna Insurance Company.

Q. And what are the dates of effectiveness of the policy in general, as stated on it?

A. January 28th, 1950 for one year to the 28th of January, 1951.

Q. Now, Mr. Rukgaber, I hand you the Plaintiff's Exhibit 3, and ask you to state whether, for the purposes of saving time, that is a similar policy issued by another insurance company?

A. Yes.

Mr. Smith: What policy is that?

Mr. Garlington: This is New Hampshire Fire Insurance Company. [14]

Q. And Exhibit 4 is a policy issued by the Home Insurance Company? A. Yes.

Q. And Exhibit 5 a similar policy issued by the Atlas Assurance Company? A. Yes.

Q. In addition to the policies represented by the Exhibits 2 to 5, inclusive, were there also three

(Testimony of Ward Rukgaber.)

other policies in effect on the Darby Mills property? A. Yes.

Q. And those policies, I believe the pleadings show, have been surrendered to the insurance companies who issued them. A. Yes.

Mr. Garlington: May it also be agreed that the four policies represented by these exhibits, together with the three surrendered, represent the policies issued by the seven defendants in this case?

Mr. Smith: Yes, that may be agreed.

Q. Now, Mr. Rukgaber, will you tell us how you received the Exhibits 2, 3, 4, and 5, for Darby Mills, where did they come from?

A. From the Urton Company office in Missoula by mail.

Q. Addressed how?

A. To Darby Mills, Incorporated, Darby.

Q. Will you state generally whether the policies involved [15] here are renewals of previous policies issued through the same agency? A. Yes.

Mr. Garlington: Now plaintiff offers in evidence Exhibits 2, 3, 4, and 5.

Mr. Smith: No objection.

The Court: They are admitted.

(Plaintiffs' Exhibits 2, 3, 4, and 5, being respectively Policy No. 25-25827, issued to Darby Mills, Inc., by Aetna Insurance Co., Policy No. 1-66-19, issued to Darby Mills, Inc., by New Hampshire Fire Insurance Co., Policy No. 1070, issued to Darby Mills, Inc., by The Home Insurance Company, and Policy No. S 856533, issued to Darby Mills, Inc., by the Atlas Assur-

(Testimony of Ward Rukgaber.)

ance Company, Ltd., were here received in evidence, and will be certified to the Court of Appeals by the Clerk of the District Court, as original exhibits.)

PLAINTIFFS' EXHIBIT NO. 4

(Received in evidence March 24, 1952)

[Policy No. 1070, issued to Darby Mills, Inc., by the Home Insurance Company. See the stipulation re Plaintiffs' Exhibit No. 4 and Plaintiffs' Exhibit No. 4 on pages 38 to 68 of this printed record.]

Q. I hand you now Plaintiffs' Exhibit 2, and call your attention to certain endorsements which are affixed to the body of the policy. Do you know how those endorsements came to be affixed thereon?

A. Yes.

Q. Will you tell the jury how that was done? Speak up so they can all hear you.

A. Those endorsements were mailed to us with the instructions to attach them to the policies bearing the respective numbers.

Q. By whom were they mailed? [16]

A. By the Urton Company, Mr. Jenkin representing them, to the Darby Mills.

Q. Are you able to recall how these endorsements came to be called for? What arose that necessitated endorsements?

A. The first endorsement changed the policy from covering various equipment and machinery at the planing mill in Darby solely to the sawmill equipment, machinery and buildings at Conner. The second endorsement came about through an

(Testimony of Ward Rukgaber.)

excessive, what we assumed to be, rate, and we asked for a rate inspection, and we were billed with the premium for the ensuing year and asked to attach the endorsement to the policy. The next endorsement came through that they were unable to effect the rate change as of the date they desired, and moving it up to a later date, which effected an additional increase in the premium.

Q. How were these matters covered by the endorsements originated, what led to the sending of the endorsements to you by the Urton Company?

A. Through our correspondence to them requesting these changes, the rate change and the dropping of certain properties in Darby and removing everything to the sawmill building and equipment and various other buildings.

Q. Did you communicate with anyone else as agent or representative of defendant companies in connection with these matters? [17] A. No.

Q. Did you receive communications from anyone else representing these companies in connection with these matters? A. No.

Q. By referring to the Exhibit 2, can you state the total amount of insurance coverage which was being carried on the sawmill machinery and equipment which was in the fire?

Mr. Smith: We object to that, your Honor, on the grounds the policy is the best evidence of its own contents.

The Court: Yes, the objection is sustained.

Q. I ask you to refer to Standard Form 78B attached to the policy, and referring to the mimeographed sheet attached there, item 1, Sawmill build-

(Testimony of Ward Rukgaber.)

ing, \$2,000; furniture, fixtures, machinery, equipment, \$12,500. Will you state whether that item 1 which I have read relates to the sawmill machinery and equipment which is involved in this litigation?

A. Yes.

Q. Will you state whether the item "furniture, fixtures, machinery, equipment" therein referred to, includes any motor vehicles or moving equipment?

A. No.

Q. Now, to whom were payments of premiums made for the insurance policies we referred to?

A. The Urton Company in Missoula.

Q. By Darby Mills? [18] A. Yes.

Q. Now, going back to December 15th, 1950, and referring to your discussion with Mr. Shulman concerning matters of insurance, what, if anything, did you do immediately thereafter?

A. I personally called on Mr. Jenkin of the Urton Company and told him we had effected a bill of sale purchase agreement for the machinery, and that we wanted the coverage, if possible, for the Alex Shulman Company during the period of time they were dismantling the mill. He assured me—

Mr. Smith: Just a minute, we object to that on the ground it is not responsive. We object to it further on the ground that under the policies which have now been admitted in evidence, the policy requirements require that any consent by an agent to an assignment of interest in the policy be in writing, that oral consent is not effective. If this

(Testimony of Ward Rukgaber.)

testimony is for the purpose of establishing oral consent in behalf of Mr. Jenkin or the agent of these companies, we object to it on the ground that the authority of the agent has not been shown.

The Court: I don't think you have yet shown the authority of the agent, but you may go ahead with this testimony if you are going to tie it up.

Mr. Garlington: I don't know whether you want to discuss this in any particular detail at this point. Between the admissions of the answer and the procedure—— [19]

The Court: I don't understand the admission in the answer refers to Mr. Jenkin, or who he is, and that sort of thing.

Mr. Garlington: That will be——

The Court: Maybe we had better discuss it, in any event.

(Jury admonished and excused from the Courtroom, and the following proceedings took place in the absence of the jury:)

The Court: Yes, Mr. Garlington, I understand your position to be that the Urton Company, as a result of the allegations and admissions in the pleadings are established to be general agents?

Mr. Garlington: That plus the precedures.

The Court: And the procedures that have been followed with reference to these.

Mr. Garlington: That's right. Mr. Jenkin, you see, was the party who executed the policy for Urton Company.

(Testimony of Ward Rukgaber.)

Mr. Smith: We are not objecting on the ground that the authority of Jenkin, as agent of Urton Company has not been sufficiently proved; that is, whatever Urton Company had authority to do, we would admit Mr. Jenkin had authority to do, but our point goes deeper than that, and these admissions in the pleadings are as to certain specific things; they had power to collect premiums; they had various powers. It is specifically denied in the answer they had any power to consent orally to an assignment. We say that because the policy itself expressly forbids the oral consent. It goes [20] further and expressly forbids any agent to make any waiver of policy conditions unless the waiver is in writing, and we say the policy itself constitutes a limit on the authority of the agent, and consequently, under the policies in this case, there cannot be any authority to give any oral consent. Our objection goes to those problems.

Mr. Garlington: That is what we are fighting over.

The Court: I have read your brief, of course, and have read the cases you have cited that were available to me. Some of the cases you cited, I didn't have available, and it may be if you could secure them you might give them to me before the two o'clock session starts so I can make a final and definite ruling on this case, but from the cases that were available to me, I don't see your point. The cases have generally held, I believe, that the general agent, who has all of the power of the com-

(Testimony of Ward Rukgaber.)

pany, of the principal, is authorized, and the cases so hold that when the general agent does waive such a provision as is here involved, he may do so, and he is authorized to do so.

Mr. Smith: The problem here is not a problem of waiver. It is a different problem from that. This problem is a problem of taking on a new insurance risk, and doing it orally. It is true we do not allege forfeiture of these policies on the ground there has been a breach of condition with respect to title. We are saying Alex Shulman never became owner of [21] this policy because the contract limitation of the authority of the agent requires any new owner be consented to in writing by the company. It is not a problem of an agent waiving title or ownership or waiving a provision with respect to title. It is a problem of a new contract being created between the company and somebody who heretofore was a complete stranger to the contract; and we recognize that the courts have gone very far in rewriting insurance policies so far as waiver provisions are concerned, but I don't think those cases are applicable to this situation where it is sought to make a new contract between these companies and someone who was a stranger before that.

The Court: Don't you think the cases have held that you can create a contract between—for the benefit of a party—an insurance contract may be entered into for the benefit of a party who is not a party to the contract itself?

Mr. Smith: I don't think it has been done in

(Testimony of Ward Rukgaber.)

cases where the policy provisions are as they are here.

The Court: The cases I have seen and read, the Tuttle case, the Montana case you have cited, it didn't appear in that case that the agent was a general agent.

Mr. Smith: I don't think it is a problem of the extent of the agency; I think it is a problem of fulfillment of the contract. We can dig up some of the cases.

The Court: If you will get me a couple of the other cases, I [22] will be glad to look at them. Otherwise, I do believe you have an existing contract of insurance here. Now, if the general agent, the company, in other words, may then endorse that policy to be made payable to another party as his interests may appear—the company can do that.

Mr. Smith: Yes, there is no question the company can do it.

The Court: Yes.

Mr. Smith: But the question is whether the policy provision which requires it be done in a particular sort of way is a valid provision in the policy, and we believe that where the policy says that assent must be given in writing by the company that that in itself is a limitation on the authority of any agent to do it. I talk about general agent; I don't know whether Urton Company is a general agent or not. Certainly they do all sorts of things. I don't think they are general agents to the point they are permitted to rewrite terms of the policy.

(Testimony of Ward Rukgaber.)

The Court: I am afraid that is what the authorities hold, that the company on one hand can't hold out a man as being a general agent, having full authority to write or enter into contracts, make any endorsements and changes, and say he was—they can't give him full authority on one hand and limit it on the other. I think that is what the cases hold. If you have something stronger in the cases not available to me—I just [23] have the Pacific and Federal cases, so if you have one or two of those others that might be of some benefit to me, I will be glad to read them before the afternoon session. However, with reference to the particular question of the agent Jenkin, his authority and position in the thing has not been established, unless you want to agree to it.

Mr. Smith: I don't think we will agree to it, but the objection wasn't aimed at that.

The Court: By the way, do you have proposed instructions?

Mr. Garlington: Yes, your Honor, I am just getting them stuck together here.

The Court: I will say that I don't know why I haven't considered it before, but what is your position, Mr. Garlington, with reference to this bill of sale. In your brief, you say that, as I recall it, they were retaining possession and control of the property in order to, so to speak, protect their purchase money, but that doesn't appear to be the terms of the contract at all.

Mr. Korn: May I explain that position. I think

(Testimony of Ward Rukgaber.)

the testimony of this witness, as well as Mr. Shulman, who entered into this agreement, will establish the fact that they agreed between themselves that this insurance coverage should become effective and protect both. I am sure the testimony will show the intent of the parties that no cancellation of insurance should be made on the part of the Darby Mills, and [24] an endorsement should be made——

The Court: I am not interested in that particularly. What I am concerned with is what is the situation with reference to any insurable interest remaining in Darby Mills?

Mr. Korn: The intention of the parties, and the evidence will show they intended that Darby Mills was protected on the balance of the purchase price.

The Court: Do you think they can create an insurable interest by their own separate agreement? The question of whether or not Darby Mills has an insurable interest will depend upon the result of that contract they entered into, won't it?

Mr. Korn: Yes. I think, shall we say, the collateral agreement, which they can explain, while not appearing in writing, is part of the agreement they made between themselves.

The Court: You can't vary the terms of the agreement.

Mr. Korn: Between the parties you can. These parties don't dispute the terms of the agreement. No third person, under the law, can question the understanding. If the question had arisen between

(Testimony of Ward Rukgaber.)

these two people, if Darby Mills on the one hand, contended the agreement meant one thing, and Shulman contended it meant a different thing, then the agreement would be binding, but I think the parties themselves can come in——

The Court: Can come in and tell us, “This is our agreement, but it doesn’t mean we sold the property?”

Mr. Korn: It don’t contradict the agreement. They had [25] a collateral agreement regarding insurance.

The Court: If Darby Mills didn’t have an insurable interest, whether they agreed with Shulman wouldn’t make any difference at all. Whether they have an insurable interest is determined by the sale of the property. Now, some of the cases you have cited agree even when you sell property, you may retain an insurable interest when you retain possession of it, and the possession is, and it is understood they are retaining possession in order to protect their interest in the remaining purchase price, but Darby Mills doesn’t retain possession here to protect itself at all.

Mr. Korn: Our theory of this now is this: That a layman isn’t concerned with the legal implications of the language or of the particular term in that agreement. The Court is interested in determining what the parties agreed upon, and whether or not Darby Mills, through Mr. Rukgaber, intended to retain some kind of interest there by reason of the policies they had in effect. If that was the intent

(Testimony of Ward Rukgaber.)

of the parties, if Darby Mills, as part of this sale, intended they should retain coverage, there is no dispute.

The Court: Darby Mills can intend anything they want to, but if they don't have an insurable interest, they can't get any insurance.

Mr. Korn: But isn't the total agreement, the agreement made between these parties, whether put in writing or not, isn't [26] that the controlling factor?

The Court: Darby Mills may have agreed with Shulman that they were going to retain insurance to protect their interest, they may have agreed to do that, but if they don't have an insurable interest, what difference does it make?

Mr. Korn: Let's assume the evidence will show they intended to maintain control of the property. The agreement says, "Payment shall be made on removal and not later than January 15th." If by that agreement they intended to retain a sufficient interest to be sure payment was made on removal, they still intended to retain some interest.

The Court: You don't have a case like that.

Mr. Smith: Of course, your Honor, we dispute that is the fact.

The Court: That would be a matter of evidence as to whether or not it is a fact or not. I don't see how it is possible for you to come in and say, "Here is our bill of sale transferring title to Shulman," and then come in and say, "That is what it says

(Testimony of Ward Rukgaber.)

there, but we didn't transfer title." Is that what you want to do?

Mr. Korn: If that is the situation, I am wondering what the position of the defendants is in this case. They take the position in the answer that there isn't any insurance coverage on the part of anybody.

The Court: That may be so, or it may be that just Darby Mills [27] is out of the picture. It may be you can arrive at a situation here, I suppose, depending upon what the facts are, that Darby Mills had no insurable interest, so they are out of the picture, they weren't insured. Then, it becomes a question as to whether or not Shulman was insured. Now, maybe Shulman was insured as a result—Shulman had an insurable interest. Maybe as a result of the witness' conversation with the insurance company, or the general agent of the insurance company, and his agreement to protect Shulman, maybe Shulman is protected. That may be the result of it, but no matter what they agreed to, if Darby Mills didn't have an insurable interest, Darby Mills isn't insured. You may arrive at that point in finally disposing of the matter where Darby Mills is out of the picture and Shulman is protected by the insurance policy, and then, of course, you will get into the question—the fact that whether or not proofs of loss were waived by the defendants with reference to Darby Mills, of course, won't have any effect upon Shulman. Do you see what I am concerned with?

(Testimony of Ward Rukgaber.)

Mr. Korn: Yes.

The Court: If you can get me some information on some of these matters around 1:30, give it to me.

Mr. Korn: I just want to clarify this position. Is it the Court's present position that the testimony as to this total agreement is not admissible? Maybe that is a pretty [28] premature question. I just wondered if the Court has reached that point?

The Court: Of course, I don't see how you can say—you can't say the title didn't pass. You can't vary that at all.

Mr. Korn: The agreement doesn't—the parties when they signed that agreement didn't say title.

The Court: They said, "We hereby grant and convey."

Mr. Boone: That is as to title and possession, both.

The Court: It specifically provides possession is transferred.

Mr. Korn: It provides for delivery. The word "Deliver" is in there, your Honor, but nothing is said about title.

The Court: Of course, they don't say the word "Title," but they can't use these other words and not convey title. When they grant it, that is just what they do, change title, and that is all there is to it.

Mr. Korn: I think that the evidence as to the entire agreement, whatever the legal effect of it may be is, still is between these parties who are not

(Testimony of Ward Rukgaber.)

contradicting their own agreement. They simply testify what their agreements are.

The Court: It may be. I would like to have you show it to me. It doesn't seem to be the right thing, without reference to a question of law, for these two people, in the face of their written agreement to come in as against other parties and say, "That is our written agreement, but we didn't mean that at all. We entered into a different agreement entirely." [29]

Mr. Korn: Would the Court like one citation, the case of *Greening v. Gazette Printing Co.*, 108 Mont. 158 at 165?

The Court: Do you have the Pacific citation?

Mr. Korn: Yes, 108 Mont., 158, 165 is the page, 88 Pacific Second, 862.

The Court: Very well, the Court will stand in recess until two o'clock.

(2-hour recess.)

(The jury returned to the Courtroom and the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, I apologize to you for the long wait at this time when Court was recessed until two o'clock, but counsel and the Court have been in session with reference to legal problems that I explained to you before, and while it is important that we all be present at the time Court is called, this was one of those times when we just had to impose upon you. I apologize.

(Testimony of Ward Rukgaber.)

Proceed. There is an objection pending before the Court:

(The last question, answer and objection read back by the Reporter.)

The Court: You don't object, though, with reference to Mr. Jenkins' position?

Mr. Smith: We are not making any contention here that Mr. Jenkins could not do anything Urton itself could do.

The Court: Objection overruled. [30]

Q. (By Mr. Garlington): To get us back on the track, Mr. Rukgaber, we have heard the reading of the question and your answer to that. What date did that statement you have just heard read take place? A. December 15th, 1950.

Q. Who was present when it was made?

A. I don't know as I understand you.

Q. Who was there when this statement was made?

A. You mean who I made the statement to?

Q. Yes. A. Mr. Shulman and Mr. Craft.

Q. I think you don't understand. After you left the law office with the signed agreement, which is Exhibit 1, the contract of sale, where did you go?

A. I went directly to the Urton Company from the Montana Building.

Q. Who was with you?

A. I went into Urton's alone.

Q. Had you up to that point been with Shulman?

A. Yes.

(Testimony of Ward Rukgaber.)

Q. Where did he go?

A. He went on down the street?

Q. And then you alone went into the Urton Company office? A. Yes.

Q. Now, who was in the office when you went in, if you recall? [31] A. Mr. Jenkin.

Q. Anybody else besides Mr. Jenkin?

A. I don't believe there was.

Q. About what time of day was it?

A. Oh, I would say it was somewhere between three and four in the afternoon.

Q. Is the question that the reporter read there, or the answer he read as given by you a summary of what you said to Mr. Jenkin on that occasion?

A. Yes.

Q. Can you recall for us, as nearly as possible, the words that you used and the reply that Mr. Jenkin made? A. You mean what he told me?

Q. What you told him, Mr. Rukgaber, and what he told you. Let's relate the conversation as fully as you can to the jury.

A. I told Jenkin that we had come to an agreement with this purchase agreement and bill of sale with the Alex Shulman Company, and I would like to have our insurance endorsed to cover them as well as Darby Mills during the process of dismantling. He told me that it could be done and he would take care of it, that I had nothing further to worry about.

Q. Was there a request made of you for a copy of the sale agreement?

(Testimony of Ward Rukgaber.)

A. A copy of the sale agreement?

Q. Yes, by Mr. Jenkins? [32] A. No.

Q. Were any questions asked concerning the nature and extent of the sale by Mr. Jenkin?

A. No.

Q. Were there any requests made of you to furnish or procure any additional information or documents, or do anything further concerning that subject? A. Request by me?

Q. By Mr. Jenkin of you? A. No.

Q. Well, when you left the office, what did you understand was expected of you by way of further conduct concerning the subject of this insurance?

Mr. Smith: To which we object on the ground it calls for a conclusion of the witness, a summary of his understanding.

The Court: Sustained.

Q. Where were the insurance policies, Exhibits 2, 3, 4 and 5 at the time of this conversation with Mr. Jenkin?

A. In the files of Darby Mills in their office at Darby.

Q. Were you requested to send those in to Urton Company for any purpose in connection with this transaction? A. No.

Q. Was anything said about when or how the endorsements would be furnished? A. No. [33]

Q. At the time you went in to see Mr. Jenkin, had the contract, Exhibit 1, been signed?

A. Yes.

Q. Did you have a copy in your possession?

(Testimony of Ward Rukgaber.)

A. Yes.

Q. Did you also have with you the check for a portion of the purchase price? A. Yes.

Q. Was any inquiry made of you as to whether the transaction had been partially or completely performed by Mr. Jenkin? A. No.

Q. What was your understanding, derived from the conversation with Mr. Jenkin, as to whether the insurance coverage was effective from that time forward to include the Shulman Company under the policy?

Mr. Smith: To which we object on the ground it calls for a conclusion of the witness. He may say what was said or done, but not as to his understanding.

Mr. Garlington: I should like to suggest that the legal theory behind this matter is that in part of estoppel, based upon the understandings and beliefs of the parties from the conduct which has been described. I think it is competent to show what his understanding was in relation to that theory.

Mr. Smith: It would be our position we wouldn't be bound by any understanding that he had except such as a normal [34] person would get. He may relate the words, but any understanding he had, whether valid or invalid, is not binding upon the defendants here. If for the purpose of estoppel, we would object to it. It is not material insofar as the plaintiff Shulman is concerned.

The Court: Read the question.

(Question read back by Reporter.)

(Testimony of Ward Rukgaber.)

The Court: I will overrule the objection.

Q. Will you answer the question now, Mr. Rukgaber.

A. It was my understanding from Mr. Jenkin that we, as Darby Mills, and Mr. Shulman would be protected. We had nothing further to worry about.

Q. Protected from what date?

A. December 15th, 1950.

Q. Now, between December 15th, 1950, and the occurrence of the fire on January 2, 1951, did you receive any further communication or word from the Urton Company concerning the insurance?

A. No.

Q. Now, then, we will turn to the subject matter of what property was on the premises at the time of the fire. * * *

(Then follows testimony with respect to the property destroyed and damaged in the fire.)

Q. Now, one more question, Mr. Rukgaber, from any time after December 15th, 1950, has there been a refund of any part of the premiums on these seven insurance policies insofar as the [35] insurance on sawmill machinery and equipment is concerned? A. No.

Mr. Garlington: That is all of the direct examination.

(Testimony of Ward Rukgaber.)

Cross-Examination

By Mr. Boone:

Q. Mr. Rukgaber, in the period of time that you have been connected with Darby Mills, have you been the one who has always taken care of the insurance matters for that company? A. Yes.

Q. For what period did that cover, please?

A. Approximately four and a half years.

Q. And during that period of time, you were the one who arranged for the insurance policies that were written for the company, and also were the one who filed proofs of loss for the various fires the company had, were you not? A. Yes.

Q. And in your capacity as the secretary and also the general manager of this company, and in relation to your insurance matters, you did have occasion from time to time to stop in to see Mr. Jenkin of the Urton Company Agency?

A. Yes.

Q. And as a matter of fact, it is true, is it not, that you made a practice of stopping in to see Mr. Jenkin on occasions even when you had no business with him relative to the question [36] of insurance matters? A. No.

Q. Did you not make it a practice to drop in and pass the time of day and so on with him from time to time when you were in Missoula?

A. No.

Q. You want us to understand the only time you stopped to see him at the Urton office was when

(Testimony of Ward Rukgaber.)

you had some business with him relative to insurance matters? A. Yes, sir.

Q. Prior to the date of December 15th, there were pending insurance matters between you and Mr. Jenkin, were there not? A. Yes.

Q. There were matters that related to the revaluation of the property that was covered by these policies, was there not? A. Yes.

Q. And you and Mr. Jenkin were in the process of working on that both prior and subsequent to December 15th, 1950? A. Yes.

Q. And, as I understand it, there was certain revaluations that would have to be obtained from you and agreed to by the Company before new policies could be written on the property which was covered by these particular policies when those policies expired? [37] A. No.

Q. Isn't that so? A. No.

Q. What was the revaluation with reference to then, sir?

A. The revaluation was on the renewed policy.

Q. Your previous statement was that you did have these matters of revaluation under way both prior to and subsequent to December 15th, 1950?

A. They were prior to, yes.

Q. And some subsequent to?

A. I think not.

Q. You recall of no communications or conversations with Mr. Jenkin subsequent to December 15th with respect to revaluations?

A. State that again, please?

(Testimony of Ward Rukgaber.)

Q. I say, do you recall of any conversations or communications with Mr. Jenkin subsequent to December 15th with respect to revaluations?

A. You mean prior to that time?

Q. No, I said subsequent, sir. A. No.

Q. Now, at the time this matter of disposing of this equipment came up, as I understand your testimony, you did quite a bit of work in determining or trying to determine the value of this sawmill equipment prior to entering into this [38] agreement with Shulman Company?

A. Yes. * * *

(Then follows testimony with regard to the property destroyed or damaged in the fire and its value.)

Q. Mr. Rukgaber, under the terms of this instrument which has been introduced here as Plaintiffs' Exhibit 1, entitled, "Bill of Sale and Purchase Agreement," the total price is stated as \$6,750, of which \$3,375 was paid at the time of the execution of the agreement according to the terms, and the balance of \$3,375 was payable to you or to your company upon the completion of the removal of the items of equipment, but in no event later than January 15th, 1951. Was that balance of \$3,375 paid to Darby Mills by Shulman.

Mr. Garlington: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. No.

(Testimony of Ward Rukgaber.)

Q. And it hasn't been paid up to this date?

A. No.

Q. As a matter of fact, Darby Mills, Incorporated, started an action in the District Court of Ravalli County against Alex Shulman Company to recover \$3,375, has it not?

Mr. Garlington: Same objection.

The Court: Sustained, what is the purpose?

Mr. Smith: The purpose is to show what interest the [39] witness has in this lawsuit. Our purpose was to show what happened in this proceeding and to ask further inquiries as to things in the proceedings, and to show just what status Darby Mills and this witness has in this proceeding at the present time. We think it is always competent to show what the witnesses——

The Court: Aren't you going pretty far afield? He says, "No, he hasn't been paid."

Mr. Smith: Of necessity cross-examination is exploratory.

The Court: But that is the final answer you are looking for, isn't it?

Mr. Smith: No, we want to find out if any agreements contingent upon this lawsuit were made, or what the circumstances are.

The Court: You don't go into exploratory fields of that nature. I'll sustain the objection.

Mr. Smith: May we make an offer of proof?

The Court: Yes. You don't have to take time now. Make it and we will discuss it later.

Q. (By Mr. Boone): Let me ask you this, sir,

(Testimony of Ward Rukgaber.)

since the 25th of June, 1951, has there been any agreement made between Darby Mills, Incorporated, and Alex Shulman or Alex Shulman Company with respect to the payment of this \$3,375, bearing in mind the outcome of this litigation?

Mr. Garlington: Objected to as incompetent, irrelevant [40] and immaterial, improper cross-examination.

The Court: Sustained.

Q. On your direct examination, Mr. Rukgaber, you were asked with respect to the preparation of this agreement, Plaintiffs' Exhibit 1, on December 15th, 1950, is that true? A. State that again?

Q. On direct examination you were asked with respect to the preparation of this agreement, Plaintiffs' Exhibit 1, on December 15th, 1950?

A. Asked what?

Q. You were asked in regard to the preparation of this agreement? A. Yes.

Q. And I believe that you stated that the agreement was prepared in the office of Murphy, Garlington and Pauly, attorneys? A. Yes.

Q. Those attorneys are here in Missoula?

A. Yes.

Q. And that firm of attorneys had been, prior to the 15th of December, 1950, the attorneys for Darby Mills, Inc.? A. Yes.

Q. They had handled the business of that company ever since its formation, had they not?

A. Yes. [41]

(Testimony of Ward Rukgaber.)

Q. In fact, they were the firm that incorporated the Company? A. Yes.

Q. And so that firm of attorneys were representing Darby Mills on the day of this agreement and in the preparation of this agreement?

A. Yes.

Q. Now, actually, the agreement was drawn by Mr. Pauly of that firm, was it not? A. Yes.

Q. Now, on your direct examination you were asked this question, "Now, at that time and place"—referring to the time of the preparation of this agreement here in the offices of Murphy, Garlington and Pauly—"Mr. Rukgaber, was there any discussion between you and Mr. Shulman concerning the matter of insurance coverage on this property?" and your answer to that was. "Yes." Do you remember making that answer, sir? A. Yes.

Q. So that in the office of Murphy, Garlington and Pauly this matter of insurance first arose?

A. Yes.

Q. And the matter arose prior to the actual writing of this agreement? A. No.

Q. Was it after the writing of it?

A. Yes. [42]

Q. Was it before the agreement was signed?

A. No.

Q. Was it after the agreement was signed?

A. Yes.

Q. But, at any rate, it happened in the offices of the attorneys on that day? A. Yes.

Q. And I take it you were present, Mr. Shul-

(Testimony of Ward Rukgaber.)

man was present and Mr. Pauly was present?

A. Mr. Pauly was not present.

Q. After the agreement was signed, did you and Mr. Shulman sit around the office in the absence of Mr. Pauly?

A. Yes.

Q. But you are sure it took place in Mr. Pauly's office?

A. Yes.

Q. On the 15th of December, 1950?

A. Yes.

Q. Was that the only time that the matter was discussed before you saw Mr. Jenkin on that day?

A. We discussed it further in the elevator and on the street.

Q. But the discussion which you have related here on your direct examination took place in Murphy, Garlington and Pauly's office?

A. Yes. [43]

Q. Where was Mr. Pauly at the time?

A. He was out at his stenographer's desk.

Q. Was he dictating other papers in connection with this transaction?

A. I don't know.

Q. Had you finished your business with Mr. Pauly at that time?

A. Practically.

Q. Was there any occasion for you to be waiting for him?

A. We had another question we wanted to ask.

Q. Did that relate to insurance?

A. No.

Q. Did you, prior to the time this agreement was prepared, did you or Mr. Shulman or anybody else present mention the matter of insurance to Mr. Pauly?

A. No.

(Testimony of Ward Rukgaber.)

Q. Did all of the conversation you have related here take place in the absence of Mr. Pauly?

A. Yes.

Q. Did all of the conversation that you have related here take place in the offices of Murphy, Garlington and Pauly?

A. I think I answered that, didn't I?

Q. If you did, I am sorry, I didn't get it.

A. We discussed it in the office and in the elevator and on the street. [44]

Q. You stated that when you went down to see Mr. Jenkin and made this statement to him that you have related here, that that was in the afternoon?

A. Yes.

Q. Did he have your insurance file out at the time, sir? A. No.

Q. Would you recall that he made any notation on a file while you were present on that day?

A. He made a pencil notation on the pad on his desk.

Q. You are sure it was on a pad? A. Yes.

Q. Did you happen to see what the pencil notation was? A. No.

Q. You only saw him make one notation?

A. Correct.

Q. Now, isn't it a fact that you went in to see Mr. Jenkin on this occasion for the purpose of discussing with him the matter of revaluations on your property at Conner? A. No.

Q. Isn't it a fact that on this occasion, on this 15th of December, the only thing you told Mr.

(Testimony of Ward Rukgaber.)

Jenkin was that you were selling the equipment to Shulman? A. No.

Q. You at that time had in your possession at Darby all of the insurance policies? [45]

A. Yes.

Q. Did you, at that time, offer to wait in Mr. Jenkin's office until these endorsements were prepared? A. No.

Q. Was there any discussion as to how long it would take to prepare the endorsements?

A. No.

Q. Was there any discussion as to when the endorsements would be prepared? A. No.

Q. Was there any discussion as to whether those endorsement that I requested? A. No.

A. Yes.

Q. What was said in that connection, please?

A. He said, "Ward, when they are ready, I will mail them down to you."

Q. This was on the 15th of December?

A. 1950.

Q. At any time between the 15th of December and the 2nd of January, not having received endorsements from Mr. Jenkin, did you either call him or write him to say, "I haven't received the endorsements that I requested? A. No.

Q. Do you recall, sir, having received some forms from Mr. Jenkin on or about the 29th day of December, 1950, relative to [46] revaluation of property covered by these policies? A. No.

Q. You don't recall that. Do you recall having

(Testimony of Ward Rukgaber.)

sent those forms back to Mr. Jenkin the early part of January, 1951? A. No.

Q. Would you say that you did not receive the forms from him and had not returned them, or just that you don't recall? Which would you say, please?

A. State that again.

Q. Would you say you had not received the forms I am talking about and sent them back, or that you don't recall receiving them and sending them back?

A. I don't recall receiving any forms.

Q. And you don't recall receiving any communications from Mr. Jenkin on or about the 29th of December, 1950? A. No.

Q. After this fire took place on the 2nd of January, you had occasion, did you not, to be in Missoula on the 14th day of January, 1951?

A. That I couldn't say.

Q. Well, would it refresh your recollection any, Mr. Rukgaber, if I were to tell you on that day that you called upon Mr. Jenkin at his office and that the two of you then went to the office of Harry Noel, the fire insurance adjuster? Do you remember that occasion? [47]

A. I can remember an occasion of that kind, yes.

Q. Do you remember on that occasion there was present in Mr. Noel's office, Mr. Noel, Mr. Jenkin and Mr. Howard Speer, a special agent of the Atlas Insurance Company? A. Yes.

Q. The four of you. Do you remember on that occasion that there was a conversation between the

(Testimony of Ward Rukgaber.)

four of you with respect to the fire and with respect to the matter of insurance coverage?

A. I think there was some discussion on it, yes.

Mr. Smith: While Mr. Boone is looking for those papers, I will submit to the Court an offer of proof with respect to this cross-examination.

Defendants' Offer of Proof 1

“Defendants by cross-examination of the witness Rukgaber now on the stand want to develop the fact that an action was commenced on June 25th, 1951, by Darby Mills, Inc., against Alex Shulman in the District Court of Ravalli County to recover the balance of \$3,750 due under Ex. 1 in this case, and that an attachment was levied in that action and that funds of Alex Shulman in the amount of \$3,750.00 were attached. That subsequently the attachment was dissolved by stipulation. Defendants seek to inquire whether this was on agreement between Darby Mills and Alex Shulman at the time the attachment was dissolved [48] under which arrangements were made by which Alex Shulman would pay Darby Mills if Darby Mills would join in and assist in the prosecution of this action.”

The Court: Go ahead, and I'll rule on this after Mr. Garlington has had an opportunity to see it.

Q. (By Mr. Boone): Do you recall on that occasion in Mr. Noel's office you were asked by Mr. Speer whether at any time during the transaction with the Shulman Company you had agreed to assign any interest in the insurance to the Shulman

(Testimony of Ward Rukgaber.)

Company? Do you recall being asked that question, sir? A. No.

Q. You don't recall making an answer of "No" then to that question? I will ask you if you were asked the question at that time if you had discussed the question of insurance with Mr. Shulman and answered "No" to that question?

A. No, I don't remember that either.

Q. Did you recall at that time that Mr. Jenkin was asked in your presence by Mr. Speer if he had ever been requested to assign the insurance policies or any part thereof to the Alex Shulman Company, and Mr. Jenkin's statement of "No" to the question. Do you remember that, sir?

A. No, I don't. I am just trying to remember back quite a little ways on some things that happened some time back. It is a hard proposition.

Q. Do I understand you would deny, or do now deny, that these [49] conversations I have related actually took place?

A. I wouldn't deny them.

Q. I say would you now deny that those conversations took place at that time?

A. I can't say I would deny them, but I don't recall them.

Q. You were also questioned on your direct examination by Mr. Garlington with respect to the proof of loss which you signed in connection with the fire, were you not? A. Yes.

Q. And one of the items of coverage under these fire insurance policies was item number 1, referring

(Testimony of Ward Rukgaber.)

to sawmill building, \$2,000. That building was destroyed by this fire, was it not? A. Yes.

Q. And also item number 2, the blacksmith shop, frame, that was destroyed by the fire?

A. Yes.

Q. Were those the only two buildings in the schedule that were destroyed by fire, or were there other buildings, sir?

A. They are the only two that were destroyed by that fire.

Q. Items 1 and 2, so far as buildings were concerned? A. Yes.

Q. And the proofs of loss which you submitted to each one of the seven insurance companies were with relation to the two building items?

A. Yes. [50]

Q. And the insurance companies accepted the proofs of loss on those items and paid you for them?

A. For the buildings, yes.

Q. In other words, there was never any question raised by the insurance companies of the right of the Darby Mills to recover insurance on the two building items, was there?

A. None to my knowledge.

Q. And promptly after the submission of proofs of loss with respect to those, you were promptly paid?

A. Within a reasonable length of time.

Mr. Smith: That would be all, I think, we have on cross-examination, except for the matters mentioned in the offer of proof.

(Testimony of Ward Rukgaber.)

The Court: Mr. Garlington, when was this action commenced in this Court?

Mr. Boone: In January, 1952, your Honor.

The Court: Is there an objection to the Defendants' offer?

Mr. Garlington: The plaintiffs object to the defendants' offer of proof 1 for each of the following reasons: it is incompetent, irrelevant and immaterial, improper cross-examination, and would not serve in any respect to bear directly on the interest of the witness, and would be so remote as to be inconsequential in that respect.

The Court: I will overrule the objection to the offer, and you may proceed. [51]

Mr. Garlington: May our objection go then as stated to all interrogation?

The Court: All interrogation under the offer of proof, yes.

Q. (By Mr. Boone): Mr. Rukgaber, did your company on June 25th, 1951, commence an action in the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Ravalli, against Alex Shulman Company, copartnership consisting of Louis Schwartz, Harry Schwartz and Alex Shulman, to recover the sum of \$3,375, together with interest at the rate of six per cent per annum from January 15th, 1951, until paid, under the agreement which has been introduced here in evidence as Plaintiffs' Exhibit 1?

A. I was informed that it had been started, yes.

Q. And your company, Darby Mills, Incorpo-

(Testimony of Ward Rukgaber.)

rated, in that action, caused an attachment to be issued attaching the funds of the defendant Alex Shulman Company in the State Bank of Somers, Montana, in the amount of \$3,500?

A. I was told it had been, yes.

Q. I will next ask you if, on the 12th day of December, 1951, your company, through its attorneys, caused that attachment to be released of the funds in the State Bank of Somers, Montana?

A. I was told it had been released.

Q. Now, under what arrangements between Darby Mills and Alex Shulman were those funds released? [52]

A. I couldn't answer.

Mr. Garlington: I should like to make a special objection on each of the same grounds. It seems to me it is even more remote and even further away from any legitimate range of cross-examination; further, it appears from the answers of this witness that his information is all second hand or hearsay.

The Court: That is so. You might ask him if he made any arrangements.

Q. I will ask you if you, either directly or indirectly, through your attorneys, made any arrangements with Alex Shulman, either directly or with his attorneys, with reference to the release of these funds from the attachment?

A. I did not.

Q. Can you tell us what member of your company had anything to do with that matter?

A. The president of the corporation.

Q. Is he present in Missoula or in Montana?

A. No.

(Testimony of Ward Rukgaber.)

Q. Was that matter handled by him in connection with his attorneys, Murphy, Garlington and Pauly of Missoula?

A. So far as I know, it was.

Mr. Boone: That is all. [53]

Redirect Examination

By Mr. Garlington:

* * *

(First on redirect examination was testimony with regard to values of property destroyed or damaged in the fire.)

Q. Now, counsel asked you concerning the details of the signing of this contract, Exhibit 1, in our office, and the matter of the discussion of the insurance between you and Mr. Shulman, and asked you particularly where Mr. Pauly was, what he was doing, what you were doing, and so on. Just to put the picture together, did you describe, or would you describe the sequence of events leading from the time the Exhibit 1 was signed until you left the office?

A. Well, I don't know as I recall exactly what took place. After we signed the agreement, Mr. Pauly went, as far as I know, out to the stenographer's desk, and Mr. Shulman and I sat there alone in the office for a few minutes until Mr. Pauly returned, but what I had on my mind, or what Al and I had on our minds to ask him at that moment, I couldn't tell you. It has been quite awhile ago.

(Testimony of Ward Rukgaber.)

Q. But, in any event, the discussion concerning insurance was private between you and Mr. Shulman, I take it? A. Yes.

Q. And continued there in the office and on your way downstairs and out on to the street? [54]

A. Yes.

Q. Now, counsel also asked you whether you had ever telephoned to Mr. Jenkin between December 15th and the time of the fire inquiring about these endorsements, and your answer was you had not. Would you tell the jury why you had not?

A. I had always in the past dealings with Mr. Jenkin of Urton Company been able to rely on his word. When he told me, regardless of what the insurance matter was, that it would be taken care of, it was. I didn't question in my mind at all his ability.

Mr. Garlington: That is all.

Recross-Examination

By Mr. Boone:

Q. In other words, you had always found Mr. Jenkin had taken care of your insurance matters promptly with dispatch and efficiently?

A. Yes.

Q. That covering an experience over a period of four years that you had been dealing with him?

A. Yes.

* * *

(Testimony of Ward Rukgaber.)

(The remainder of the testimony of this witness was with regard to the property destroyed in the fire.)

Mr. Boone: That is all.

(Witness excused.) [55]

ALEX SHULMAN

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Korn:

Q. State your full name, please?

A. Alex Shulman.

Q. Where are you engaged in business?

A. In Seattle and in Somers.

Q. Seattle, Washington, and Somers, Montana?

A. That's right.

Q. What is the nature of your business, Mr. Shulman?

A. I buy and sell used machinery and equipment.

Q. How long have you been engaged in that type of business now? A. About 15 years.

Q. With reference to the matter of the property that was sold to you by Darby Mills that has been referred to in this case, would you tell the Court and jury how you happened to deal with Darby Mills in the first place? Have you any interest, have you had any interest at all in Darby Mills?

(Testimony of Alex Shulman.)

A. No.

Q. You have never had any prior connection prior to the purchase of this?

A. None at all. [56]

Q. Would you explain how you happened to have any dealings with Darby Mills?

A. Well, originally I saw their ad in the *Timberman*, which is a magazine, a trade magazine that goes to the lumber trade.

Q. Where is that published?

A. I don't know where it is published.

Q. Did you see it on the Coast?

A. We get it in both places. We have had it in the Somers office and also in Seattle.

Q. You noticed in this trade magazine this property at Conner near Darby was for sale, is that it?

A. That's right.

Q. You made inquiries concerning it?

A. Yes.

Q. Did you, at any time, make any trip to Darby to look at the property, or make any investigation of it?

A. Yes, my first trip was, I believe, about the middle of November or early part of November, 1950.

Q. And after inspecting the property, did you make any offer to the Darby Mills?

A. Yes, I did.

Q. Was that offer made verbally or in writing?

A. No, it was made in writing.

Q. And what did you offer as a purchase price

(Testimony of Alex Shulman.)

for this machinery and equipment in this mill in place? [57]

A. I offered \$6,750 and agreed to remove it myself.

Q. In other words, the amount that you indicated in your offer you were willing to pay for it was for it as it was in place at the time. You assumed the responsibility of dismantling it. That is the same figure shown in the agreement, is that right? A. Yes.

Q. After you made this offer, did you receive any communication or any acceptance of it from Darby Mills?

A. Yes, I was—I believe I was in Somers at the time. In any event, I was called on the phone and told they were accepting my offer, and asked if I could come down here to complete the transaction.

Q. About when was that, Mr. Shulman?

A. You mean when they called me?

Q. Yes, when did you arrange to come down?

A. I think the phone call was either the 13th or 14th of December, and I came down on the 15th.

Q. Is that the date on which these negotiations were concluded in Mr. Pauly's office?

A. December 15th, yes.

Q. And it was at that time this agreement that has been introduced here as Exhibit 1, I believe, was made? A. Yes.

Q. With whom did you discuss the matter of the terms of this [58] agreement when you came to Missoula, Mr. Shulman?

(Testimony of Alex Shulman.)

A. With Mr. Ward Rukgaber and Mr. Pauly.

Q. In Mr. Pauly's office?

A. In Mr. Pauly's office.

Q. Was this Exhibit 1, this agreement, drawn in that office as far as you know? A. Yes, it was.

Q. Was this agreement, Exhibit 1, intended to cover all of the items that you were purchasing as a result of your offer, or were there other items not listed at the time in this agreement?

A. There were a number of items that we realized we didn't have on this list, so we covered them by this first sentence here which talks about all machinery of whatsoever kind or nature.

Q. "Used in connection with that certain sawmill building belonging to Seller at Conner, Montana."

A. The understanding was we were to take all the machinery at that particular mill, whether it was on the list or not.

Q. Did you at any time have any dealings with Darby Mills as to the building in which the machinery was located?

A. The only conversation we had was to the effect if we had to move a part of a wall in order to move some bigger pieces of machinery, we would not be obligated to put the wall back. [59]

Q. But you were not interested in the purchase of any building connected with this sawmill?

A. No.

Q. At the time of making this agreement, did you have any agreement with Mr. Ward Rukgaber,

(Testimony of Alex Shulman.)

the gentleman who just testified on behalf of Darby Mills, as to the insurance coverage on this property?

Mr. Smith: We object to this, your Honor, on the ground it tends to vary the terms of the written instrument that is binding upon the parties, and it violates the parol evidence rule, and may that same objection go to the whole line of this testimony?

The Court: You anticipate my ruling, do you? The objection is overruled, proceed.

A. We had some discussion about insurance. I don't quite get the question, Mr. Korn.

Q. My question is, at the time of making the written agreement I have just exhibited to you, Exhibit 1, in Mr. Pauly's office, did you and Mr. Rukgaber, on behalf of Darby Mills, have any discussion or understanding or agreement about any insurance coverage on the property covered by the Exhibit 1?

A. When you say at the time of the making—

Q. On December 15th, 1950?

A. We had a discussion on December 15th in Mr. Pauly's office. [60]

Q. Do you recall—with reference to the insurance matter? A. Yes.

Q. Tell the Court and jury just what that conversation was?

A. Well, I asked—at the time we signed, we were in Mr. Pauly's office twice in order to get the thing straightened out. We were there in the morning, and left and were told to come back late in the

(Testimony of Alex Shulman.)

afternoon, at which time the bill of sale would be ready, and on our second visit up there, we signed the agreement, and I handed Mr. Rukgaber the check, and then we went on to talk about insurance. I asked him if he could get his policies to cover me as well as him during the time we were dismantling the equipment and before we had a chance to move it up to Somers.

Q. Did you and Mr. Rukgaber arrive at any agreement between you concerning that conversation, if it could be done?

Mr. Smith: We object on the grounds it is calling for a conclusion of the witness. He may say what was done. Whether or not there was an agreement depends upon what significance the law gives to the words.

The Court: Sustained. Confine it to what was said.

Q. Just state what Mr. Rukgaber said about what he would do concerning this insurance matter?

A. He said that the agent that wrote all his insurance is right around the corner from the building in which we were in at that moment, and he would walk right down and instruct him [61] to add our names to the policies.

Q. What did you do subsequent to that discussion about this insurance? What did you do, if anything, about carrying out that portion of the understanding?

A. We left the building together and continued the discussion about it as we rode down in the

(Testimony of Alex Shulman.)

elevator and we walked to Urton Company together.

Q. Did you walk there with Mr. Rukgaber?

A. I walked as far as the door; I did not walk in.

Q. Anyone else with you at the time this occurred?

A. Yes, Mr. Craft was with me during all of these conversations that we have been talking about.

Q. Mr. Craft was in your employ at the time?

A. Yes, he was.

Q. He had what capacity with you?

A. He was in charge of our operations at Somers, Montana.

Q. He was your agent there? A. Yes.

Q. Now, did you see Mr. Rukgaber go into the Urton Company office? A. Yes.

Q. Where did you go?

A. I went to the Missoula Mercantile Company.

Q. When did you next see Mr. Rukgaber after that?

A. Oh, it was about, I would say between nine and 10 the [62] next morning.

Q. Where?

A. In Darby at the office of the planing mill.

Q. Did you have any conversation with Mr. Rukgaber the following morning, the morning of the 16th? A. Yes.

Q. At Darby? A. Yes, at his office.

Q. Just tell the Court and jury what was said

(Testimony of Alex Shulman.)

by Mr. Rukgaber to you, or what you may have said to Mr. Rukgaber concerning any matter of insurance?

Mr. Smith: To which we object on the ground it would be hearsay. Any conversation between Rukgaber and this witness would not be binding on the defendant.

The Court: What is your position? I think that is the situation, isn't it?

Mr. Korn: The point of it is to show whether or not there was any reliance placed upon the agreement made the day before with reference to the coverage and what had been done about it.

The Court: Your cause of action is not based upon such a situation as that it requires your reliance upon what?

Mr. Korn: Yes, I would think so. I think the proof would show—that the allegations in the complaint are that as a result of this agreement between Rukgaber and Shulman, [63] nothing further was done about taking out additional insurance on that property between the 15th of December and the time of the fire. The allegations of the complaint are he relied on that agreement and he found out the following day what had been done.

The Court: It is late in the afternoon.

(Jury admonished and left the Courtroom, and there was further argument in the absence of the jury. Thereafter, a recess was taken until 10:00 o'clock a.m., the following morning, April 25, 1952, at which time the following proceedings were had, the jury being present:)

(Testimony of Alex Shulman.)

The Court: Proceed. I didn't rule on that objection with the thought that Mr. Korn suggested he might have some other authority.

Mr. Korn: We won't press the matter further at this point.

Q. (By Mr. Korn): Mr. Shulman, as I recall it, yesterday at the time of recess you stated you had gone to Darby the morning following the making of this agreement of purchase. That was testified to here yesterday? A. Yes.

Q. That was on December 16th? A. Yes.

Q. And after going to Darby, what did you do, if anything, with reference to the property you had purchased under this agreement? [64]

A. From Darby we went up to the mill near Conner and proceeded to make a preliminary inventory of all of the machinery.

Q. You say a preliminary inventory. You mean it was not complete?

A. No, we didn't intend it to be absolutely complete because certain items of machinery were down underneath the mill and it was almost impossible to see until after dismantling was completed.

Q. Did you place anyone in charge of that property after you purchased it at that time?

A. Yes, I placed Mr. L. A. Hunt.

Q. Who is L. A. Hunt?

A. He is a dismantling contractor.

Q. Where is his residence? A. Spokane.

Q. In other words, his business is that of dismantling machinery of this type, is that it?

(Testimony of Alex Shulman.)

A. Yes.

Q. Has this Mr. Hunt you referred to any interest in Shulman Company or Darby Mills?

A. None at all.

Q. He has none in your business? A. No.

Q. He was simply an employee of yours directly?

A. He was not an employee; he was a [65] contractor.

Q. Do you recall when he went up to take possession and start this dismantling, how soon after that?

A. He met us in Missoula on the same night, the night of the 16th and went from there to the mill.

Q. What instructions, if any, did you give to Mr. Hunt with reference to what he should do with this property you purchased, this machinery and equipment?

A. I told him to completely dismantle the mill; I told him what all we had purchased; I told him that I would mail him a copy of this inventory I had taken that day as soon as I had it typewritten; I told him to keep a complete record as to what he dismantled and check it off against the inventory, and if he found anything I hadn't already inventoried, to add it on to the inventory. I told him we had that same day sold, I believe, three items; I told him about where they were to be delivered.

Q. Did you have any understanding with him, or instruct him to make any report to you from

(Testimony of Alex Shulman.)

time to time as to what he was doing with this property?

A. Yes, I left here and went back to Seattle and told him to report to me constantly by the phone as to the progress in the dismantling operation, and also as to any sales he might make while he was dismantling, and as to deliveries. In other words, most of the material was to be delivered to us at Somers. As he delivered it, he was to report to me about that. [66] If he found any additional items, he was to advise me about those.

Q. Did he follow instructions?

A. Yes, we spoke back and forth on the phone, I would say, at least three times a week.

Q. Now, what was done, just by way of segregation here, with this property you purchased after dismantling? You mentioned the fact some of it was taken to Somers, is that correct? A. Yes.

Q. And a few items you sold right from the site?

A. I had sold, I believe, three items on the day of the 16th, and Mr. Hunt sold perhaps another six or eight items during the couple of weeks he was dismantling.

Q. Aside from the items that you sold there from the site of this operation, and the items that were taken to Somers where your other business was being conducted, the rest of it is represented by what was destroyed in the fire, is that correct in a rough way? A. That's right.

(Testimony of Alex Shulman.)

Q. By the way, do you know the date the fire occurred?

A. It occurred on the morning of January 2nd.

Q. At the time of the occurrence of this fire, was this dismantling process you had instructed Mr. Hunt to take care of completed?

A. Removal was not complete, but the dismantling had been [67] completed.

Q. How did you learn of the fire?

A. Mr. Hunt called me that morning.

Q. In Seattle? A. Yes.

Q. What did you do upon receiving word of the fire?

A. I called Mr. Jenkin at the Urton Company.

Q. When did you call him?

A. That same morning, January 2nd.

Q. After you received the call from Hunt?

A. Yes.

Q. What did Mr. Jenkin tell you, if anything, concerning the matter?

Mr. Smith: To which we object, your Honor, on the ground it would be hearsay. There is no showing that, irrespective of Mr. Urton's power as agent, that he was an agent empowered to make any admission binding on the companies in this case. I am referring to Mr. Jenkin.

The Court: Overruled.

A. I believe you asked me what Mr. Jenkin told me?

Q. Yes.

A. He told me that he already knew of the fire.

(Testimony of Alex Shulman.)

He had turned it over to Mr. Harry Noel, who is with the General Adjustment Bureau, and I believe he even gave me his telephone number. [68]

Q. Did you do anything further, notify anybody or discuss it at this time?

A. Yes, I called Mr. Noel.

Q. Indicate what your conversation with Mr. Noel was, if you can recall.

A. Well, he told me he was going to make an investigation. He had not yet been up to the mill, and I offered to get together my records and send him a list of what was in the mill at the time of the fire, and that was about the extent of the conversation at that time.

Q. Did you thereafter at any time furnish Adjuster Harry Noel with a list of the property there at the time of the fire?

A. Yes, I mailed it to him on January 9th, I believe.

Q. Do you recall when that list was furnished?

A. I believe it was on January 9th, 1951.

Q. How did you furnish that to Mr. Noel?

A. I mailed it to him.

Q. Was there a letter of transmittal with it?

A. Yes, I believe there was.

Q. Now, this list that we will identify and number was a list of the property that was left at the scene of the fire at the time of the fire?

A. Yes.

* * *

(Testimony of Alex Shulman.)

(Here follows testimony with respect to proofs of [69] loss and the value and extent of the property destroyed or damaged in the fire.)

Cross-Examination

By Mr. Boone:

* * *

(The first part of cross-examination was with reference to value of the equipment destroyed or damaged in the fire.)

Q. When you came to Missoula on the 15th of December, you met Mr. Rukgaber in the office of Murphy, Garlington and Pauly? A. Yes.

Q. And explained to Mr. Pauly the type of agreement that both of you wanted? A. Yes.

Q. And discussed all of the terms and conditions with him? A. We didn't discuss them all.

Q. And as a result the agreement was drawn? A. Yes.

Q. Now, I noticed that the agreement is between a partnership of Alex Shulman Company, a copartnership consisting of Alex Schwartz, Harry Schwartz and Alex Shulman? A. Yes.

Q. Did that partnership remain the same then after the 15th of December until it was dissolved, as you have related? A. Yes. [70]

Q. Going to the part of the testimony with respect to the conversations in Mr. Pauly's office after the agreement was signed, the conversation relating to insurance, I will ask you if this is what each of

(Testimony of Alex Shulman.)

you said at that time: Did you ask Mr. Rukgaber at that time if he carried insurance on the machinery? A. Yes.

Q. Did he tell you that Darby Mills did carry that insurance? A. Yes.

Q. Then did you say, "Could your insurance cover us while we are in the process of dismantling," is that what you said?

A. That is, I believe, close enough. It may not be my exact words.

Q. Did he then tell you that he was not sure, but that he would contact the insurance agent, find out, and advise you?

A. No, he didn't say that he would find out and advise me. He said if it could be done, he would tell them to do it.

Q. Now, have I given the conversation as accurately as you remember it?

A. I believe that is the substance of it.

Q. And all of that conversation took place in Mr. Pauly's office?

A. Either in the office or on the way out of the building, Mr. Boone. We left the building together, rode down in the elevator. I think it is about a block and a half to the Urton [71] Company. We discussed it in a general way until he walked in the door of Urton Company.

Q. You didn't go in Urton Company?

A. No.

Q. Did you stay in Missoula, then, the rest of the 15th?

(Testimony of Alex Shulman.)

A. Yes, that night I stayed in the Florence Hotel.

Q. Were you in town the following morning?

A. Only long enough to have breakfast and then drove to Darby.

Q. You didn't go to Urton Company yourself either on the 15th or 16th?

A. No, I have never been in the office of Urton Company.

Q. When did you return to Missoula after going up to Darby?

A. Saturday night, I think it was about six o'clock. That is the 16th.

Q. Did you stay over then in Missoula?

A. Yes, we did.

Q. But you did not undertake to go to the Urton Company? A. When?

Q. After you returned from Darby?

A. No, I came in here and stayed overnight. Sunday morning I drove to Somers.

Q. You made no effort on the 15th or any other time after the 15th until the second of January to contact Urton Company about insurance? [72]

A. I talked to them on the 2nd of January on the phone, but not in between.

Q. But not prior to the fire? A. No.

Q. When you went up to Darby on the 16th, you stated you, at that time, made an inventory of the equipment? A. That's right.

Q. Do you have that inventory present, please?

A. Yes, I have.

(Testimony of Alex Shulman.)

* * *

(Here follows testimony with respect to the value of property destroyed or damaged in the fire.)

Q. One other question, please, Mr. Shulman. I am referring to an action which was brought against you by Darby Mills, Incorporated, in the District Court of Ravalli County on which you heard some testimony yesterday. Referring to the release of attachment on December 12th, 1951, will you tell us if there was any agreement made between Darby Mills and yourself for the release of this attachment? A. No, there wasn't.

Q. There was no agreement at all?

A. No, sir.

Q. Will you tell us if there was any, if you know, if there was any agreement between your counsel and the counsel for Darby Mills with respect to this action and the release of the [73] attachment? A. None that I know of.

Q. One other question. On your direct examination, you testified concerning the list which you submitted to Mr. Noel, which is the same as Exhibit "C," with the exception of having no values upon it. Did you at any time make a formal proof of loss claim listing the equipment and values to Mr. Noel? A. What do you mean by formal?

Q. Did you ever make a claim for certain property with certain values?

A. A written claim?

(Testimony of Alex Shulman.)

Q. Yes.

A. Not any different than those that we saw this morning.

Q. Just the papers introduced here this morning?

A. Yes, that is all the correspondence I have.

Mr. Boone: That is all.

Redirect Examination

By Mr. Korn:

* * *

(The first part of this redirect examination was with reference to inventories and values of the equipment destroyed or damaged.)

Q. Now, Mr. Shulman, Mr. Boone asked you at length this morning repeatedly whether you had made any efforts to see [74] either Jenkin or Urton concerning this insurance coverage subsequent to December 15th, do you recall that? A. Yes.

Q. I understood you to say that you had not made any effort to get in touch with them?

A. That's right.

Q. Tell the Court and jury why.

A. Because Mr. Rukgaber had already been told——

Mr. Smith: To which we object on the ground it is hearsay.

The Court: It isn't hearsay.

Mr. Smith: We further object on the ground it is incompetent, irrelevant and immaterial.

The Court: What is the purpose?

(Testimony of Alex Shulman.)

Mr. Korn: To explain why he didn't. An effort was made—the inference was that he should have gone to the company to see that the endorsements were made on the policies. The witness has the right to explain why he didn't do the things they infer that he should have done.

The Court: Overrule the objection.

A. Mr. Rukgaber had been told by Mr. Jenkin——

Mr. Smith: Objection. He can't testify to what Mr. Rukgaber was told by Mr. Jenkin.

The Court: Sustained.

A. Mr. Rukgaber told me on December 16th that when he went [75] into the Urton Company office that he had talked to Mr. Jenkin and Jenkin told him——

Mr. Smith: This is hearsay twice removed.

The Court: It is not being offered to prove the truth of the conversation between Rukgaber and Jenkins.

Mr. Smith: May it be understood then it is going in for that very limited purpose?

The Court: Yes.

A. He told me he had talked to Mr. Jenkin——

Q. Who?

A. Mr. Rukgaber. This is on the morning of December 16th when we came out to Darby. Mr. Rukgaber told me Mr. Jenkin had told him everything would be taken care of, and as soon as he had gotten the endorsements together, he would mail them to Mr. Rukgaber. Mr. Rukgaber told me as

(Testimony of Alex Shulman.)

soon as he received the endorsements, that is, Mr. Rukgaber, he would in turn forward them to me.

* * *

(The remainder of the testimony of this witness was with regard to the inspection he made of the property before he purchased it.)

Recross-Examination

By Mr. Boone:

Q. So Mr. Rukgaber then told you when he got the endorsements he would forward them to you?

A. Yes, sir. [76]

Q. And that was on the 16th of December?

A. Yes, sir.

Q. So that not having received the endorsements, I take it that you knew then that Mr. Rukgaber had not received them?

A. I didn't know whether he had or hadn't.

Q. At least during the period from the 16th of December up until the time of the fire, did you make any inquiry of either Mr. Rukgaber or Jenkin with respect to the endorsements?

A. No, it wasn't done yet.

Mr. Boone: That is all.

Mr. Korn: That is all.

(Witness Excused.)

* * *

Mr. Korn: The plaintiffs rest.

* * *

(Thereafter, after plaintiffs had rested, the following motions were made by the defendants in the absence of the jury:)

MOTION FOR NON-SUIT

Mr. Smith: At this time, may it please the Court, the defendants and each of them move that a judgment of non-suit be entered as against plaintiff Darby Mills herein upon the grounds and for the following reasons: First, there is no evidence in this case that Darby Mills Company had an insurable interest in the property involved in this action at the time of the fire; second, there is no proof in this case that the plaintiff, Darby Mills, ever made any proofs of loss with respect to any items of personal property which are now claimed to have been lost in the fire. * * *

With respect to the plaintiff, Alex Shulman, the defendants and each of them move that a judgment of non-suit be entered on the ground and for the reason, first, that Alex Shulman and Company was not, at the time of the fire involved herein, an insured under the various policies of insurance which have been introduced in this case; second, on the ground that no valid assignment of interest in the policies to Darby Mills could be made except in writing, and the evidence fails to show there was any writing transferring these policies or any interest in them, or any writing giving consent to the transfer to Alex Shulman Company; third—and this is a matter that has not been suggested before—we move that the judgment of non-suit be en-

tered on the ground there is no evidence [77(a)] that any assignment of these policies was ever made in fact by the plaintiff, Darby Mills to the plaintiff, Alex Shulman.

(Argument.)

The Court: I am going to reserve ruling on the motion, and we will proceed with the evidence.

Mr. Smith: That is as to both motions?

The Court: With reference to both motions. I may say just offhand I don't say your motion is good as to Shulman, but I do have some concern as to whether or not it is not a good motion as to Darby Mills. Let's proceed with the evidence. Call in the jury. [77(b)]

JAMES D. JENKIN

called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Smith:

Q. State your name, please?

A. James D. Jenkin.

Q. Where do you reside?

A. Missoula. [77]

Q. How long have you lived in Missoula?

A. Since 1922.

Q. What is your present employment, Mr. Jenkin?

A. I am insurance manager for Urton Company.

(Testimony of James D. Jenkin.)

Q. How long have you been in the insurance business? A. Since September, 1939.

Q. With whom have you been in the insurance business during that period of time?

A. Mr. Urton of the Urton Company.

Q. Are you acquainted with the corporation known as Darby Mills, Incorporated?

A. I am.

Q. Are you acquainted with Ward Rukgaber?

A. I am.

Q. During your experience in the insurance business, did you have occasion to write insurance policies for Darby Mills, Incorporated?

A. I did have.

Q. With whom representing Darby Mills, Incorporated, was your business transacted?

A. Ward Rukgaber.

Q. Over what period, Mr. Jenkin, if you know, did you write insurance for Darby Mills, Incorporated? A. I think it was started in 1948.

Q. Did it continue up to and including the date of the fire [78] we are discussing in this case?

A. It did.

Q. I will ask you if during the month of November, 1950, you had had any negotiations with Darby Mills, Incorporated, relative to some insurance policies? A. I did.

Q. What was the general subject of those negotiations?

A. I was trying to re-establish values for re-

(Testimony of James D. Jenkin.)

newals of policies coming up, and at that time I also sent some checks to him on previous losses.

Q. In connection with renewals of policies, do you remember upon what date some of the insurance which he had at that time would expire?

A. January 28th, 1951.

Q. And your negotiations had been in connection with those expirations? A. Yes.

Q. I will ask you if you remember whether Mr. Rukgaber came into the office of Urton Company on or about the 15th of December, 1950?

A. He did.

Q. When he came into the office on that occasion, Mr. Jenkin, what did he come in to discuss?

A. We were discussing renewals of the present policies, and in the course of the conversation he advised me he had sold the [79] machinery and equipment in the mill to the Alex Shulman Company.

Q. At that time did he make any request of you that the policies then covering Darby Mills be assigned or endorsed to show any interest on behalf of Alex Shulman? A. No.

Mr. Garlington: Objected to as leading.

The Court: Sustained.

Q. Was there any conversation, Mr. Jenkin, with respect to insurance coverage for Alex Shulman Company? A. None.

Q. Did Mr. Rukgaber at that time ask you to determine what the unexpired premiums were with

(Testimony of James D. Jenkin.)

respect to the personal property which was covered by their policies? A. No.

Q. Did Mr. Rukgaber say anything to you with respect to coverage of Alex Shulman during the period they were dismantling the mill?

A. No.

Q. At any time during your conversation with Mr. Rukgaber, did you tell him you would endorse these policies to cover Shulman? A. No.

Q. Did you at any time tell him he had nothing to worry about? [80] A. No.

Q. After Mr. Rukgaber left the office on the 15th, did he ever at any later time come in and discuss with you the matter of the coverage on this personal property?

A. No, not prior to the fire, no.

Q. Did he ever, at any time, prior to the fire write to you with respect to the coverage on the personal property? A. No.

Q. During the testimony of Mr. Rukgaber, he testified to the effect that after the fire and on January 2nd, he called you and that a conversation in substance similar to this took place: That he asked you about the fire and told you about the fire and that you said, "I am sorry that I couldn't get the coverage which I promised you." Did that conversation take place? A. No.

Q. What was the substance of the conversation?

A. He reported the fire. I said I was sorry to learn they had a fire, and I would refer the matter

(Testimony of James D. Jenkin.)

to the General Adjustment Bureau as our office had no authority whatever to handle any claims.

Q. During that time was there any mention of any kind with respect to the personal property covered? A. There was not.

Q. I will ask you, Mr. Jenkin, if at a later time you [81] attended a meeting in the office of Mr. Harry Noel of the Fire Companies Adjustment Bureau at which was present yourself, Mr. Rukgaber, Mr. Howard Speer and Mr. Harry Noel?

A. Yes.

Q. Could you fix the date of that conversation?

A. It was January 14th, if my recollection is correct.

Q. How did you happen to all gather in the office at that time?

A. Mr. Rukgaber came into the office and I took him up to Mr. Noel in regard to the fire loss, and Mr. Speer was in Mr. Noel's office.

Q. Who is Mr. Speer?

A. He is the special agent for the Atlas Assurance Company.

Q. That is one of the defendants in this case?

A. Yes.

Q. What was the general subject of discussion in Mr. Noel's office at that time?

A. Mr. Speer, being interested in the companies interested in the policies asked Mr. Rukgaber if he had discussed insurance in selling the property, and he said, "No."

Q. Discussed insurance with whom?

(Testimony of James D. Jenkin.)

A. With Mr. Shulman.

Q. Was anything said in that conversation relative to whether you had been requested to make endorsements on these policies?

A. There was. [82]

Q. What was that conversation, as nearly as you could tell us?

A. He was asked if he had requested me to endorse the policies, and his answer at that time was "No."

Q. You say he was asked. Who do you mean?

A. Mr. Rukgaber.

Q. Who asked the question?

A. Mr. Speer asked the question.

Q. At any time during the course of that conversation did Mr. Rukgaber say anything to the effect that this property, or this insurance, had been transferred to Alex Shulman Company?

A. No.

Mr. Smith: You may examine.

Cross-Examination

By Mr. Korn:

Q. Mr. Jenkin, how long did you say you had been manager of Urton Company?

A. I started working with Mr. Urton in 1939, and I have been manager down there since 1941.

Q. And the Urton Company is a general agent for the insurance companies, these insurance companies that are defendants in this action?

A. They are.

(Testimony of James D. Jenkin.)

Q. And you work for the Urton Company. What position do you [83] hold with Urton Company?

A. I am manager of the insurance department.

Q. As such manager, you have the power to do whatever the Urton Company has power to do?

A. Yes.

Q. And you stated that, or did I ask you, whether or not the Urton Company represents, has represented these seven insurance companies that are defendants in this action?

A. Yes, they do.

Q. And they have during the entire period of time that you have been associated with this company? A. Yes.

Q. You have written a number of policies covering—fire insurance policies on various types of property during this long experience since 1939, Mr. Jenkin, haven't you? A. Yes, I have.

Q. And you have written probably hundreds of policies for these various companies during that time? A. Yes.

Q. In that capacity as manager and agent for these companies, I suppose you have frequent requests and applications for insurance by various customers? A. Yes.

Q. You are in the habit of writing the kind of insurance they want as far as those companies are able to furnish it? [84]

A. As far as they will permit us to write policies.

(Testimony of James D. Jenkin.)

Q. You have authority to write policies, don't you?

A. We have authority to write policies on such risks as they authorize us to write.

Q. Do you mean by that that if you write a policy, you have to confer with someone in San Francisco or New York for authority?

A. No, we don't. Some classes of risks we have to refer to the company before we are authorized to issue policies.

Q. When you issued these policies involved in this litigation on behalf of these seven companies, you had authority to issue those policies?

A. I had authorities from the companies to issue them.

Q. You did issue the policies to Darby Mills covering these properties? A. Yes.

Q. Now, I'll hand you Plaintiffs' Exhibit 5, for instance, one of these policies. That is your signature on the front page of the policy?

A. That is my signature?

Q. Are you familiar with the signature that appears on the document on the next page?

A. Yes.

Q. Whose signature is that?

A. Terry Urton's. [85]

Q. He has what capacity in the Urton Company?

A. He is the owner.

Q. And the next document on this Exhibit 5, Plaintiffs' Exhibit 5, has a signature on it. Whose signature is that?

(Testimony of James D. Jenkin.)

A. That is my signature.

Q. You made that endorsement?

A. I had the secretary draw it up.

Q. You signed it? A. Yes.

Q. You sent that endorsement to Darby Mills at Darby, Montana? A. Yes.

Q. You sent it to them by mail? A. Yes.

Q. You authorized them to attach it to this policy, is that correct? A. Yes.

Q. And on the next page there appears another endorsement on this same policy, Plaintiffs' Exhibit 5, which bears a signature. Is that your signature?

A. That is my signature.

Q. You made that endorsement in your office?

A. Yes.

Q. Was that likewise mailed out to Darby Mills with instructions that it be attached to this [86] policy? A. It was.

Q. And the following sheet is a long endorsement that bears a signature at the bottom. State whether or not that is your signature.

A. That is my signature.

Q. Was that endorsement made by you on behalf of Atlas Assurance Company and sent to Darby Mills? A. It was.

Q. And you authorized them to attach it to this policy? A. I did.

Q. You have authority, then, Mr. Jenkin, to not only accept applications for original insurance, but also to make endorsements to meet changing conditions under the policy? A. Yes.

(Testimony of James D. Jenkin.)

Q. In the performance of your duties as agent of these various insurance companies, your practice has been to make those endorsements when requested? A. That's right.

Q. Now, Mr. Jenkin, how many customers would you say that your company handles in the course of a year, say? How many policies, fire insurance policies do you write?

A. We write 1,000 or better.

Q. And how many endorsements during the course of a year, for instance, would you normally make on these policies?

A. Well, there is very few endorsements made, excepting a [87] change of ownership, something of that kind.

Q. Isn't it a fact that you make endorsements for the purposes of indicating a change of interest in the property, such as a sale under contract?

A. We do.

Q. Or if a mortgage is given, the policy holder calls up and says, "I have given a mortgage, and I want the policy endorsed to show that interest"?

A. We do upon evidence of a sale or transfer of a mortgage.

Q. Mr. Jenkin, in connection with the conduct of this business you also engage in what is commonly referred to as the binder practice?

A. We issue no binders without we first notify the company that we want a binder. We have no binders in our office whatever.

Q. Just to make it specific since you understand

(Testimony of James D. Jenkin.)

what my question means, Mr. Jenkin, is it not a fact if one of your customers calls you up and says, "I have just bought a piece of property. I haven't time to come down to see you. It is located so and so, I want it covered by insurance to protect me." Isn't it a fact you say in the course of practice, "Very well, John, or Harry, you can consider it covered as of today"?

A. We first ask the amount and write the policy as soon as possible and thereafter take the application. Everything is handled by application of the insured. [88]

Q. Would you deny you ever tell the man or woman who calls you for immediate coverage on that sort of thing, would you deny you have ever told them, "You are covered as of now"?

A. I never denied we say, "You are covered as of now," and write the policy as soon as possible thereafter.

Q. You date it back so it bears the date of the request?

A. We do it as of that day, if possible, if not, it is done the next morning. We don't carry anything over from one day to the next; if it is possible we take care of it the same day.

Q. It is a fact that you do issue coverage, or you tell your client that he can consider the property covered as of the time he makes the request, and the policy will be sent to him in due time?

A. Yes, we do that.

Q. You date the policy, whether it is the next

(Testimony of James D. Jenkin.)

day or the following day, you date the policy from the time of the request?

A. From the time of the request.

Q. To cover him from the time of the request, is that right? A. Yes.

Q. You follow the same practice, Mr. Jenkin, with reference to the making of endorsements on policies? If a man calls you up and says, "I have sold the property or given a mortgage and I want the proper endorsement to be placed on this policy," you get the facts and say to him, "O.K., I will take care of it"? [89]

A. When the facts are presented to us, we take care of it then, but we don't take anybody's word for a mortgage until we are satisfied there is such a mortgage issued.

Q. With reference to endorsements on change of interest, do you tell him, "O.K., I'll see you are protected"? Suppose a man buys a piece of property under contract. He calls you up and says, "Mr. Jenkin, I bought this property, I want to be covered as of now." You mean to say you wait until he brings in the conditional sales contract before issuing him a policy and telling him it is going to be covered?

A. It all depends on the type of risk.

Q. I am talking about the ordinary type of insurance coverage that would be for fire protection.

A. The ordinary type of insurance coverage, why we would issue it and hold it there until we had proof that there was such a contract issued.

(Testimony of James D. Jenkin.)

Q. And this matter of requesting endorsements on policies by policy holders is very common, a very common practice, isn't it?

A. It is a common practice.

Q. These policies, Mr. Jenkin, I think you stated, were dated in 1950. For the sake of establishing a period of time, let us say as of December 15th, 1950, as a beginning point, how many policies would you say you have written, just an estimate? How many policies would you say you have written since [90] December 15th, 1950, in connection with these companies you represent?

A. I couldn't give you any definite figure.

Q. Well, an estimate, just an estimate?

A. Well, we will say 50 at the present time, about, a year, and I have—about 750 or so.

Q. About 750 policies. I suppose the issuance or making of endorsements on policies that have been issued is as frequent or more frequent, perhaps, than even the issuance of original policies, I mean changes occur—

A. You issue policies more frequently than endorsements.

Q. How many endorsements on these 750 policies issued since December, 1950, would you say you have made, an estimate, please?

A. Well, your endorsements on policies—we don't have, I wouldn't say, 10 per cent of them are endorsed after they are issued.

Q. What?

(Testimony of James D. Jenkin.)

A. Ten per cent after issuance we put endorsements on.

Q. Only 10 per cent. Mr. Jenkin, in addition to the fire insurance business which you have indicated you conduct through Urton Company for the purpose of fire coverage, isn't it a fact you issue a lot of other types of insurance policies, for instance, automobile insurance? A. We do. [91]

Q. Public liability insurance and all that sort of thing? A. Yes.

Q. What would you say the total per year, total volume of policies issued by your company per year would amount to? A. Well—

Q. On all coverages? A. About 25,000.

Q. To make sure that I understood your answer there, when you said 25,000, did you mean policies, actually the number of policies?

A. The number of policies? You asked me the value of policies.

Q. No, the number of policies.

A. Well, in the other coverages, I would say we write about 200 per year, various other coverages beside fire.

Q. 200 a year? A. Yes.

Q. Now, you stated on direct examination, Mr. Jenkin, that Mr. Rukgaber did come to your office on December 15th, 1950? A. Yes.

Q. And you stated, I believe, that you denied that he made any request for the endorsement of any policy at that time, is that right?

A. No request was made of me.

(Testimony of James D. Jenkin.)

Q. Now, had Mr. Rukgaber been in to your office any time [92] immediately preceding that occasion?

A. Preceding the 15th. He had been in there before, yes, he had been in several times before the 15th.

Q. I said immediately preceding, shortly before?

A. Shortly before the 15th, no. That was the first time he was in there for some time.

Q. When he came in on December 15th, what time of day was it?

A. Some time in the afternoon, I don't know exactly what time it was.

Q. Would you state to the Court and jury just what the conversation was, what you said, and what he said when he came to your place on December 15th, 1950?

A. I was trying to establish values.

Q. I am asking you what you said and what he said, not a narration of it.

A. In establishing fire values, I had asked Mr. Rukgaber about fire values in order to renew his policies which were expiring January 28th. In the course of the conversation, Mr. Rukgaber said he was selling the machinery and equipment to Alex Shulman Company.

Q. You want the jury to understand when he came into your office December 15th, 1950, you were the one that opened the conversation by suggesting to him that he had a policy that was about ready to be renewed? [93]

(Testimony of James D. Jenkin.)

A. I had been corresponding before that, and sent out a number of checks and mentioned about a new statement of values. I thought Mr. Rukgaber was in there for that purpose.

Q. Go ahead with your conversation. Just what did Mr. Rukgaber tell you December 15th, 1950, at the occasion of this conversation you have just referred to?

A. As near as I can remember the conversation, we talked about new values and in the course of the conversation he mentioned that he had sold the property to Alex Shulman, was selling. I probably should say not sold, but was selling.

Q. You can't recall any specific statement Mr. Rukgaber made to you on that occasion?

A. Other than he was selling the property is the only thing I can recall. I have a note in my file that he was selling the property to Alex Shulman Company.

Q. That was all he said? A. Yes.

Q. Did you ask any questions about it?

A. No, I didn't.

Q. That was December 15th. When did you see him next, subsequent to that time, concerning this renewal matter on these policies?

A. Some time in the latter part of December. I sent him up a blank form to set out his values for his buildings, because on insurance policy coverage, we have to submit a new set of [94] values to the fire board each year to get the established rate.

Q. Within the latter part of December, within

(Testimony of James D. Jenkin.)

two weeks, you made out some new forms to send to him for the purpose of renewing the same insurance?

A. For establishing values for renewal policies, yes.

Q. At the time you sent those out, you didn't send any request or make inquiry of him or ask any questions about endorsements, or whether or not he had made any sale?

A. I did mention if Alex Shulman Company got their stuff out he said they were selling. I figured he had sold it, but I wanted to find out.

Q. You had a conversation with him concerning that matter on the 15th of December?

Mr. Boone: No. If your Honor please, the witness said that was a letter, a subject of correspondence.

The Court: Yes, but let him inquire. Was that in a conversation on December 15th?

A. December 15th was the conversation.

Q. That is the conversation you have just narrated; and later on, some time in December—

A. I sent blank forms for a new statement of values.

Q. That is all you sent him?

A. Yes, and I asked him in the letter if Alex Shulman Company had removed any of the [95] stuff.

Q. Have you a copy of the letter you sent him?

A. I have in the office.

(Testimony of James D. Jenkin.)

Q. Will you produce it, please, and we will have it for our next session? A. O.K.

Q. But you didn't subsequently see him concerning the matter of these endorsements or what had been done between the time of this conversation on December 15th, and the time of the loss in January, you had no further conversation with Mr. Rukgaber? A. No.

Q. Did you have any difficulty in dealing with Mr. Rukgaber on matters of insurance prior to that?

A. No, I have never had any trouble with Mr. Rukgaber in dealings.

Q. Did you on prior occasions in connection with these policies follow the practice of following his request for the issuance of a policy or the renewal or make an endorsement?

A. Following his request it was sent in and the companies approved the risk and I followed out the request.

Q. Now, after December 15th, 1950, did you make out any new policies to replace these, contemplating to deliver them?

The Court: What are you talking about? Are you referring to these specific policies?

Mr. Korn: Yes.

A. There was renewal policies issued for a reduced amount. [96]

Q. Those policies were actually written up?

A. They were written up upon a statement of

(Testimony of James D. Jenkin.)

values that was submitted to our office and sworn to.

Q. Did you send those new policies you have just referred to now which were to replace the others, did you send those new policies to the Darby Mills?

A. I did.

Q. On what date?

A. I can't remember the date they were sent out.

Q. You are positive of that?

A. They were sent out some time before the expiration of the policies, but I can't remember the date. It was in January some time.

Q. In January? A. Yes.

Q. Well, would it be, say the 20th, what would be your practice on that?

A. We send them out as soon as we can get the average rate from the Fire Rating Bureau's office and can write the policies.

The Court: What insurance are you talking about; you sent out renewal insurance on what property?

A. On the property of Darby Mills that was left after the fire.

The Court: What kind of property? [97]

A. Buildings, and there is one item of personal property.

The Court: Would you call a policy a renewal policy—handing you Exhibit 3, did you issue a renewal policy on that property in January of 1951?

A. We issued it on a new policy form, with a

(Testimony of James D. Jenkin.)

new form attached to it setting out the various coverages.

The Court: Covering the same property?

A. Not all the same property.

The Court: Some of the same property?

A. Some of the same property. We use the term, renewal of that policy, for the companies' information that they have been on the risk before, and they know if we had authority to issue such a policy on a risk of this kind.

The Court: Do you have a policy that was a renewal of this particular policy, Exhibit 3?

A. Those are sent in for cancellation, they were cancelled out.

The Court: You don't have those policies now?

A. No.

The Court: Proceed.

Q. Those renewals you say they were cancelled out, the policies you issued as renewals were returned to the insurance company, is that right?

A. Yes.

Q. If I understood you correctly, you say you didn't have [98] any further conversation between Mr. Rukgaber and yourself between the 15th and the time of this fire, is that right?

A. Never had any other conversation.

Q. But you did know as of December 15th, 1950, that Mr. Rukgaber had sold this property?

A. He said he was selling it.

Q. And at no time, you at no time then did you follow your practice between December 15th and the

(Testimony of James D. Jenkin.)

end of the month, say, of either finding out from Mr. Rukgaber what property had been sold or what endorsement had been made, despite the fact you had discussed the matter of the sale with him and knew there might be a transfer of interest?

Mr. Smith: Objected to on the ground it is misleading and refers to a practice. He says, "You didn't follow your practice." This witness hasn't testified as to any practice of making endorsements on policies on merely being advised there is a change of interest in the absence of a request.

The Court: Sustained.

Q. As far as you were concerned, Mr. Jenkin, you did nothing further about this matter of the transfer of interest in any of this property covered by the seven policies we are speaking of in this case, the four of them that have been introduced in evidence, and the three of them that have been surrendered; you did nothing further about learning as to what portion of that property or any of those policies had [99] been transferred?

A. Unless there is a request to do it, I did not get into other people's business to find out what they are transferring or selling.

Q. But you said a moment ago you prepared some renewals covering the same property.

A. Only upon a statement of Mr. Rukgaber, a signed statement of values of what was left at the plant. It was submitted to the fire board for the average rate.

(Testimony of James D. Jenkin.)

Q. You are talking now about policies that were issued some time subsequent to the fire loss?

A. Yes.

Q. Not about these policies in question or about any endorsement on these policies?

A. These policies are issued here according to Mr. Rukgaber's statement of values at the time the policies are issued.

Q. Getting back to my question, I am not sure——

The Court: Is the jury as confused as I am about what is being talked about?

Q. I think you had better straighten this whole thing out, put it down one, two, three. I don't know what you are talking about. I hope the jury knows. Getting back to December 15th, 1950, Mr. Jenkin, you stated Mr. Rukgaber came in and at that time told you he was selling some property, some of the property covered by the policies involved in this lawsuit [100] issued by the seven defendant companies, is that right? A. Yes, he did.

Q. I asked you whether or not you had any conversation with Mr. Rukgaber between the 15th of December when you had this conversation we just referred to, any other conversation, or any other communication with him between the 15th of December, 1950, and the 2nd of January, 1951?

A. You asked me if I had a conversation. I said, "No," but I did write a letter asking for a new statement of values.

Q. That is all you did?

(Testimony of James D. Jenkin.)

A. That is all I did.

Q. You made a statement awhile ago that you did make some inquiry of Mr. Rukgaber the latter part of December of 1950 concerning the renewal of these policies.

A. Yes. I sent up a new form for him to set out his values.

Q. Then, did you do anything further about that after you sent out those forms?

A. He brought them in and I acknowledged his statement and sent it on to the Fire Board for re-issuance of new policies.

Q. When did Mr. Rukgaber bring those statements in, when are you talking about?

A. I don't know the exact date; some time in January.

Q. And you still insist that Mr. Rukgaber is wrong when he says that he, at any time requested you to make any endorsement on any of these policies indicating that he had sold a portion [101] of the property to Shulman.

A. No request was made to me to endorse the policies.

Q. At the time of the conversation on December 15th, 1950, did Mr. Rukgaber tell you that he contemplated making a sale of the property at some future time?

A. He told me he was selling the property. That was the words I got down; I think I copied as near as possible on my records that he was selling the

(Testimony of James D. Jenkin.)

property in the sawmill to the Alex Shulman Company.

Q. You made that notation?

A. I made that notation.

Q. Then you didn't do anything further about inquiring from him or making any endorsements, or finding out to whom he was selling, or what should be done about endorsing the policies to protect the interests of Darby Mills or the purchaser?

A. There was nothing ever requested of me, and I don't ask anybody about what they want done until they come into the office to ask for an endorsement.

Q. Mr. Jenkin, as part of your practice in selling insurance, you sell a service to your customers, don't you? A. We do.

Q. As part of that service you advise your customers the kind of insurance that should be carried, perhaps the amount they should carry, and what should be done by way of protecting their interests. That is all part of your service? [102]

A. Yes.

Q. Darby Mills had been your customer, according to your testimony here for a number of years prior to December 15th, 1950, when this conversation took place? A. Yes, I said that.

Q. Mr. Rukgaber came in and you admit he told you that he was selling some of the property covered by these insurance policies? A. Yes.

Q. And you at no time did anything subsequent to that, either at that time or subsequently, to find

(Testimony of James D. Jenkin.)

out from him who he was selling to, what he had sold, who the insurable interest was in, in whose name the insurance should be issued, what endorsement should be made. In other words, in this case, you didn't do anything about the result of that conversation?

A. A lot of property is sold. We don't go out and ask people how they want their policies endorsed. There is a lot of property sold without endorsement ever being put on the policy and the policy expires.

Q. You didn't ask Mr. Rukgaber whether he sold under a contract and he was to be protected under the contract or whether it was an out and out sale and how the purchaser was to be protected, you didn't say anything about that? A. No.

Q. Then, you weren't concerned about rendering any service [103] in this situation, knowing that the sale was being made, you weren't concerned about rendering any insurance service, either as a continuing service to your customer, Mr. Rukgaber, nor to the man who was buying, or the institution who was buying the property?

Mr. Boone: Objected to as argumentative.

The Court: Overruled.

A. As I said before, we don't inquire into what people are doing. If they want an endorsement on their policy, they will come in to our office and ask for it. Without we are required to, we don't ask if they want an endorsement put on their policy.

Q. Mr. Jenkin, isn't it a fact that in the course

(Testimony of James D. Jenkin.)

of conducting your business, if you learn of some individual that has bought some property from someone, whether it is new or old, it is part of your business to find out, and perhaps sell him some insurance if he hasn't any?

A. We go out to sell insurance, yes.

Q. In this case you had insurance on certain property. You knew that the property, or a portion of it, at least, was going to be sold, or had been sold, and yet you did nothing about either servicing the man you were representing who had coverage at the time, or the new purchaser, regardless of what his interest might be?

A. No, I didn't know when it was going to be sold or anything [104] about it. If it was sold and he wanted an endorsement, he would come in, which I would have to submit to the company on a change of a sawmill risk.

Q. Despite the fact he told you he sold the property or a portion of the property, you made no inquiry as to whom it was sold, or what remaining interest there was?

The Court: The witness didn't testify he had been told the property was sold.

Q. That he was selling the property.

The Court: Revise your question.

Q. Despite the fact Mr. Rukgaber told you that he was selling the property or a portion of it in the course of this conversation on December 15th, 1950, you made no inquiry from him as to the condition of sale, nor as to who the purchaser was, or who

(Testimony of James D. Jenkin.)

had the insurable interest for the purpose of protecting or making the policy provide for the protection normally to be needed in that situation?

Mr. Smith: Counsel has introduced "protection that would normally be needed."

The Court: Objection sustained.

Q. In summary, you made no inquiry and did nothing further about the information he gave you?

A. No.

Q. By that you mean you didn't?

A. I didn't make any inquiry. [105]

Q. After he had told you, after Mr. Rukgaber had told you he was selling this property or a portion of it, and you subsequently prepared renewals, did you make any inquiry of Mr. Rukgaber as to whom these policies should be issued, whether they could cover just the same amount of property, or just what the situation was going to be on these renewals?

A. I think I answered that in a question before, that I sent up a new blank form and a statement of values for Mr. Rukgaber to sign, stating what property they wanted to insure.

Q. Your request was simply as to a statement of values?

A. I covered a statement of values of the property to be insured, a blank form.

Q. You don't know when you sent that?

A. That was in December.

Q. Do you know whether he ever received it?

A. Yes, because he came back with a signed

(Testimony of James D. Jenkin.)

statement of values which was acknowledged and sent to the Fire Bureau for the average rate on the property they wanted to insure.

Q. Are you referring now to what you testified awhile ago that he came back some time the latter part of January and had these new policies issued on whatever property they had? A. Yes.

Q. You don't mean to say that had anything to do with property lost in the fire?

A. Nothing to do with property lost in this fire, because it [106] is not shown on the new policies.

Q. Mr. Jenkin, how did you first learn of the fire?

A. Mr. Rukgaber called me from Darby.

Q. When was that?

A. January 2nd, 1951.

Q. What did you tell Mr. Rukgaber on that occasion?

A. I told him I was sorry to learn he had a fire, that I would report the fire to the General Adjustment Bureau which handles all claims on fire insurance policies in our office.

Q. By that you mean the office here in Missoula?

A. The office here in Missoula.

Q. That is the office Mr. Harry Noel conducts?

A. Yes, the same office.

Q. Now, you referred to a conversation that occurred on January 14th, I believe. You stated that you took Mr. Rukgaber to Mr. Noel's office?

A. To Mr. Noel's office.

Q. And Mr. Jenkin, may I ask you this ques-

(Testimony of James D. Jenkin.)

tion: Have you been in the courtroom during the course of this trial? A. I have.

Q. You heard Mr. Rukgaber testify?

A. I did.

Q. And do you say now that Mr. Rukgaber at no time requested you to make any endorsements to cover the change in interest in any of the property that was involved in these policies? [107]

A. No request was ever made of me to endorse it.

Q. When, Mr. Jenkin, were you first notified that there was no coverage on this property so far as Darby Mills was concerned?

Mr. Smith: We object to that, your Honor. The evidence in the record shows there was coverage on this property so far as Darby Mills is concerned. The policies are in evidence; they were never cancelled. The question relates to a state of facts wholly without the record.

Mr. Korn: Either I don't understand counsel, or he doesn't understand me.

Mr. Smith: You said, "When were you notified there was no coverage on this property?" The property was covered so far as Darby Mills is concerned if they had any interest in it.

The Court: Yes, that is so. I will sustain the objection.

Q. Did you have any conversation, Mr. Jenkin, with Mr. Noel concerning this loss that occurred on some of this property covered by these seven policies in this case?

(Testimony of James D. Jenkin.)

A. I just reported it and went up there with Mr. Rukgaber, as I stated, on January 14th. That was as far as my conversation went with Mr. Noel, because when there is a claim turned over to the adjuster, I have nothing more to do with it. I don't discuss the claims with that office unless there is a delay or not a satisfactory adjustment being made. Then I ask him what he has done on it, and then I report it to the company for their [108] answer.

Q. Mr. Jenkin, did Mr. Shulman, the man who testified here in this case this morning, at any time communicate with you concerning this fire loss subsequent to January 2nd, 1951? A. No.

Q. You never had any conversation with Mr. Shulman at any time?

A. At any time subsequent to the loss, no.

Q. Do you deny Mr. Shulman called you on the telephone concerning this loss?

A. He called me on January 2nd saying there was a loss. I said, "If there is any loss on Darby Mills, it is being referred to the Adjustment Bureau," and I gave him the Adjustment Bureau's number.

Q. Did you tell him he wasn't covered by insurance?

A. I didn't say a word about any coverage.

Q. But you are positive that subsequent to the conversation of January 2nd, 1951, you had no further conversation with Mr. Shulman at any time concerning the matter of this loss, is that right?

A. That's right.

(Testimony of James D. Jenkin.)

Q. When Mr. Rukgaber came to your office on December 15th, 1950, and told you that he was selling this property, did you ask him for any instruments evidencing the sale? A. No.

The Court: You have covered that a half a dozen times, [109] counsel.

Mr. Korn: Not about instruments, your Honor.

The Court: He said he didn't have any conversation with him, didn't do anything. Isn't that what he said? He told him and that was all. He didn't do anything further about the matter, and that was all. All right, go ahead and ask the question. Let's get speeding up here. We are wasting too much time. We will be here trying this case for a week.

Mr. Korn: Read the question.

(Question read back by Reporter and also the answer.)

Mr. Korn: That is all.

Redirect Examination

By Mr. Smith:

Q. Mr. Jenkin, Mr. Korn has asked you with respect to endorsements on policies, and I will show you Plaintiffs' Exhibit 5, one of the exhibits anyway, and I will ask you if these papers which are clipped in here entitled "Endorsement" are what you have been referring to as endorsements?

A. These are what I have been referring to as endorsements.

Q. In the course of your coverage with Darby

(Testimony of James D. Jenkin.)

Mills, had you been frequently requested to make endorsements on the policies? A. I had.

Q. In every case where an endorsement had been requested, was the endorsement made and mailed to Darby Mills? [110] A. It was.

Q. When a policy of insurance is written, Mr. Jenkin, what do you do with respect to the notification of your companies?

A. Well, if there is a risk that we are not to take without referring to the companies, we immediately contact the company. After a policy is issued, one policy goes to the Fire Adjustment Bureau for their approval of the rate, and it is sent on to the company for their files.

Q. What happens with respect to endorsements?

A. The same procedure is followed with endorsements. The company gets one copy which goes to the Fire Rating Bureau to be cleared and sent on to the company.

Q. Mr. Korn brought out from questions that there are some kind of risks you can't take without prior approval. Is a sawmill that type of risk?

A. A sawmill is a more hazardous risk.

Q. When the applications were made in this case, were you required to make application to the companies to get their consent to take this risk?

A. I was. I had to refer to the companies to get to take the risk. I referred to about 12 companies before I got the desired number of policies.

Q. In that connection did Mr. Rukgaber know

(Testimony of James D. Jenkin.)

that you were making the request of the companies for the coverage?

A. Yes, he should have known because it was handled through [111] Garlington and Pauly's office at that time, where the original risk came from.

Q. Now, in connection with endorsement and changing a sawmill risk, is there any requirement that you request the consent of the company?

A. Before I can change the risk from one owner to the other, I have to take it up with the companies for their approval before I can issue any endorsements.

Q. Is that true with respect to sawmills?

A. Sawmill risks are more hazardous risks.

Q. Mr. Korn asked you generally with respect to practice on endorsements. What have you to say as to whether it is the practice of your company when requested to make an endorsement to make that endorsement immediately?

A. We make it immediately. If it is late in the afternoon, we make it the next day. It depends upon what time of day it is received. If it is received during business hours, we get the endorsement out during business hours, if possible. It takes precedence over anything else in the office.

Q. Is it the policy of your company to carry any risks for a period of as long as 15 or 17 days on oral promises of any kind?

A. No, everything must be valid, or must be in writing to be valid.

(Testimony of James D. Jenkin.)

Q. There has been some discussion about these renewal policies, [112] Mr. Jenkin, and I will ask you if these policies which are in evidence here expired on January 28th, 1951, is that correct?

A. Yes, that is correct.

Q. And at about that time were you interested in renewing some of these policies?

A. We were, and I sent up the blank form for values to be established and a jurat to be signed by the assured stating the values were correct which were to be referred to the Fire Board for rating.

Q. I call your attention to a sheet on Plaintiffs' Exhibit 5 which describes 12 items at Conner, Montant, did you see that? A. Yes.

Q. Are each of those 12 items items of specific property covered under this policy?

A. Yes, except one I think is eliminated by endorsement.

Q. When the renewal policies about which we have talked were issued, were some of the items shown on these policies dropped out?

A. Yes.

Q. Specifically, was the sawmill building?

A. The sawmill building and contents and blacksmith shop and contents.

Q. They were dropped out of the new policies?

A. Yes. [113]

Q. These renewal policies were issued some time after the loss, is that correct?

A. After the loss.

(Testimony of James D. Jenkin.)

Q. They were issued at the request of Mr. Rukgaber? A. That is correct.

Q. You indicated you had in your file a letter which was written to Mr. Rukgaber in December some time? A. Yes.

Q. Is that available in your office?

A. It is.

Q. And you also indicated at the time he was in, you made a note on your file with respect to the conversation. Is that note available? A. It is.

Q. Will you, at the next recess, get those over here, please? A. Yes.

Q. Now, Mr. Korn interrogated you with respect to your service to Darby Mills. Did you have any concern insofar as the coverage of Darby Mills themselves was concerned?

Mr. Korn: We object to that as calling for a conclusion of the witness and leading.

The Court: Sustained.

Mr. Smith: I am through with our redirect, your Honor, except I would like to put in evidence the letter which was referred to in cross-examination. [114]

The Court: You may recall him at a later time.

Recross-Examination

By Mr. Korn:

Q. With reference to what you have testified to here as obtaining permission or asking permission of your companies for covering certain risks, do I understand you that in this case you made no re-

(Testimony of James D. Jenkin.)

quest for the issuance of any coverage for the new risks involving the property in question under these policies after December 15th, 1950?

A. The policies were issued in the name of Darby Mills. After I have authority to insure Darby Mills, if there is a change of assured on the same property, I have to get permission from the companies to do so.

Q. As I understand then, Mr. Jenkin, in connection with the policies, the seven policies involved in this case and the property they cover, you at no time sought any authority from any of these companies so far as giving any coverage to the new purchaser was concerned?

A. I was never requested to do so.

Q. Now, you mean that you expected Mr. Rukgaber to request you to ask permission of your company, is that what you mean?

A. Permission for assignment of any policy of that nature, there had to be a request made to make it, which I put on an application form and request and sent it in to the company for [115] their approval.

Q. In other words, do I understand you correctly, before you make a request of any companies for permission to make that kind of endorsement or issue that kind of policy, you have to have a written request from the person who is interested in insurance?

A. They have to request me to have the policy assigned. I have to know all the particulars, and

(Testimony of James D. Jenkin.)

I submit it to the company for their approval, for a change in the risk of any kind.

Q. These policies, Mr. Jenkin, I suppose you have seen them many times. You are familiar with the expiration dates? A. Yes.

The Court: Let's not get into this. We have gone through the policies a dozen times. Let's start another line at this late date.

Mr. Korn: I was going to ask about premiums.

The Court: Was anything brought up on that on redirect? Limit it to the redirect. We are consuming too much time.

Mr. Korn: I don't know, I don't recall. I don't want to infringe on the Court's time. I thought the matter of the premiums on these particular policies was gone into. I want to ask if there had been any refund of the unexpired portion of the policy.

The Court: There doesn't seem to be any [116] issue.

Mr. Korn: It goes to the question of the conclusion of the witness, what his understanding was.

The Court: Let's go ahead, it will take less time to ask the question. Go ahead.

Q. Is it not a fact that at least three of these policies, Mr. Jenkin, had been renewed the preceding month, that is, in November, 1950?

A. Yes.

Q. And they were issued for a period of a year?

A. Correct.

Q. And at the time of this fire loss on January 2nd, there was a considerable portion of those three

(Testimony of James D. Jenkin.)

policies, so far as the premium is concerned that had not been earned, is that correct?

A. There was still premium earned on those policies of what remaining property was up there, and after a certain amount of loss, there is no reinstatement covering that property or any premium refunded.

Q. If there was no endorsement or transfer of any interest as of December 15th when this agreement of sale was made, if as of that date these policies ceased to cover any of the property because of this transfer of interest, then there would be an unearned premium for which a refund should be made to Darby Mills?

Mr. Smith: Objected to as improper recross-examination. [117]

The Court: Sustained.

Mr. Korn: That is all.

(10-minute recess.)

Redirect Examination

By Mr. Smith:

Q. Mr. Jenkin, I show you a document marked Defendants' Exhibit 13. I will ask you if that is a copy of a letter written by you to Darby Mills, Incorporated, on November 27, 1950? A. It is.

Q. Was the original of that letter deposited in the United States Mail with postage prepaid?

A. It was.

(Testimony of James D. Jenkin.)

Q. I will ask you if the letter of November 27th contains at the bottom some handwriting?

A. It does.

Q. Whose handwriting?

A. My handwriting.

Q. At what time, Mr. Jenkin, was that handwriting placed on that letter?

A. December 15th, 1950.

Q. That was at the time of your conversation with Mr. Rukgaber? A. It was. [118]

Q. Was it a notation put on there in his presence? A. It was.

Mr. Garlington: Will you offer simply the notation on the bottom?

Mr. Smith: We offer the whole letter, Mr. Garlington.

Mr. Garlington: The plaintiffs object to the typewritten portion of Defendants' Proposed Exhibit 13 for the reason the same is incompetent, irrelevant and immaterial and it is a self-serving declaration and is improper redirect examination.

Mr. Smith: The purpose of this offer, may it please the Court, is that during the cross-examination of the witness he was asked as to certain communications which had gone between him and Darby Mills. This is one of those communications.

Mr. Garlington: He wasn't interrogated about any communication prior to December 15th. I should like to add the additional objection that it is improper corroboration or attempted corroboration of the parties' witness.

(Testimony of James D. Jenkin.)

The Court: I don't see its relevancy, the typewritten part, and I will sustain the objection to the typewritten part of the exhibit. Is there any objection to the notation made on the 15th?

Mr. Garlington: No, your Honor, there is no objection to the notation.

The Court: Very well, cover the rest of the exhibit some way. [119]

Defendants Exhibit 13

"12/15/50 Alex Shulman Co. — Purchasing equipment under items 1-2-3.

"J."

Q. I call your attention to Defendants' Exhibit 14, Mr. Jenkin. I will ask you if that is a copy of a letter written by you to Darby Mills, Incorporated, on December 29th, 1950? A. It is.

Q. Was the original of that letter placed in the United States Mail? A. It was.

Q. Addressed to Darby Mills, Incorporated?

A. It was.

Q. And was postage prepaid? A. It was.

Mr. Smith: I now offer in evidence Defendants' Exhibit 14.

Mr. Garlington: To which the plaintiffs object for the reason that the same is incompetent, irrelevant and immaterial, improper redirect examination, and for the further reason that it is also a self-serving declaration apparently offered to corroborate the testimony of the witness.

The Court: It is produced as a result of inquiry

(Testimony of James D. Jenkin.)

on cross-examination, is it not? Wasn't reference made to this?

Mr. Smith: Yes. Counsel asked him whether there had been [120] any conversations and what had been done, and he said there had been this one transaction relative to the sending of these fire forms up, and it is produced in response to that.

Mr. Garlington: That doesn't make it relevant or material.

The Court: But that is what occasions its production. I'll overrule the objection. It may be admitted.

Defendants' Exhibit 14

"December 29, 1950.

"Darby Mills, Inc.

"Darby,

"Montana.

"Attention: J. Ward Rukgaber.

"Dear Ward:

"As you know, \$20,000 insurance expires on January 28th, and in order to renew the same for the correct amount, it will be necessary to establish new values for the various buildings and file with the Montana Fire Rating Bureau a new Statement of Values for a new average rate.

"I have prepared a new form to be attached to the policies and have left the values blank so that you can complete. You can retain one copy and forward the other to me, also sign the enclosed Statement of Values in duplicate and I will complete it

(Testimony of James D. Jenkin.)

here for forwarding to the Rating Bureau. Upon receipt of this information, I will proceed so that the necessary information is on hand before the expiration of the present policies.

“Will the Alex Shulman Company have all the equipment moved by January 28th?”

“Trust that you had a Merry Christmas and be careful New Years Eve, that’s a bad night, and extending to you the best for the coming year, I am

“Sincerely yours,

“URTON CO.,

“J. G. JENKIN.

“dg”

Q. I call your attention now to Defendants’ Exhibit 15, and I will ask you what that is.

A. That is an application for an average rate and a statement of value form prepared by the Pacific Fire Rating Bureau.

Q. There is a signature at the bottom, “Darby Mills, Inc., J. Ward Rukgaber,” do you know whether that is Mr. Rukgaber’s signature?

A. It is.

Q. I call your attention in the other corner to the place where a Notary would normally sign. I will ask you if this is a copy of another document?

A. This is a copy of the original document sent to the Montana Fire Rating Bureau establishing the average rate.

(Testimony of James D. Jenkin.)

Q. On the original document was your Notary signature attached? A. Yes.

Mr. Smith: We now offer in evidence Defendants' Exhibit 15.

Mr. Garlington: Same objection, your Honor. I can't see the slightest connection.

Mr. Smith: This is again relative to the whole matter [122] of the new insurance issued, and it is brought out simply to show what was done in response to the questions asked on cross-examination.

The Court: Objection overruled. It is admitted.

Defendants' Exhibit 15

“Pacific Fire Rating Bureau
Application for Average Rate and
Statement of Values

“These values are submitted for the purpose of establishing an average rate.

Insured: Darby Mills Incorporated.

Address:

City: Darby, Montana.

State:

Average Rates are requested for:

Property Damage

Fire [X]

E.C.E.

V.&M.M.

Quake

D.A.

(Testimony of James D. Jenkin.)

Business interruption

Fire

E.C.E.

V.&M.M.

Quake

D.A.

(List each separately-rated building or division.)

Description or Location	Building	Furniture-Fixtures-Machinery-Equipment	Stock
Connor, Montana (West Fork)			
1. Machine Shop (Frame)	\$ 1,500.00		
2. Oil House (Frame)	100.00		
3. Bunkhouse (Frame- Brick Ch.)	1,000.00		
4. Bunkhouse (Same as No. 3)	300.00		
5. Bunkhouse (Same as No. 3)	300.00		
6. Cookhouse (Frame- S. P. Ch.)	2,000.00	\$ 400.00	
7. Shed and Garage (Frame)..	500.00		
8. Dwelling (Frame-Brick Ch.)	2,400.00		
9. Dwelling (Frame-S. P. Ch.)	1,200.00		
	<u>\$ 9,300.00</u>	<u>\$ 400.00</u>	

“State of Montana,

“County of Missoula—ss.

“J. Ward Rukgaber being first duly sworn upon oath says: [123]

“That he is the (identify official capacity of signer with respect to named insured, as owner, partner, officer) Treasurer of the Darby Mills, Inc., and that he makes this sworn statement for and on its behalf and that he is duly authorized so to do;

(Testimony of James D. Jenkin.)

that said concern desires to secure a rate for insurance on property located as designated above and that the above statement of values of said property is made for the purpose of securing such rate; that he has read the above statement and that said statement is true and correct as of January 20, 1951, to the best of his knowledge and belief.

“DARBY MILLS, INC.,

“J. WARD RUKGABER,

“Treasurer.

“Subscribed and sworn to before me this 20th day of January, 1951.

“Notary Public in and for the State of Montana, residing at Missoula, Montana.

“(Seal)”

Mr. Smith: That is all.

(Witness excused.) [124]

(Thereafter, at the close of all of the evidence, the following motions were made by defendants:)

MOTION FOR DIRECTED VERDICT

Mr. Smith: At this time, may it please the Court, the defendants and each of them move that a verdict in favor of the defendants be directed as against the plaintiff Darby Mills on the grounds and for the reasons stated in our motion for non-

suit made at the close of the Plaintiffs' case; and the defendants and each of them move that a verdict be directed entered for the defendants and against plaintiff Alex Shulman on all of the grounds stated in the motion for non-suit, which we made at the close of plaintiffs' evidence, and on the additional ground that it now appears in the evidence without dispute that the agent Urton and Company and Jenkin had no power to enter sawmill risks or make endorsements of a policy covering sawmill risks without specific authority of the companies involved; and may it be understood that this motion is based upon the grounds previously stated without the necessity of reiterating those grounds.

Mr. Garlington: It may be so stipulated.

The Court: I will reserve the ruling.

(Thereafter, in his charge to the jury, the Court granted the motion for directed verdict as against the plaintiff Darby Mills and denied the motions for non-suit and directed verdict against the plaintiff Alex Shulman.) [124(a)]

In The United States District Court, District
of Montana, Missoula Division

State of Montana,
County of Silver Bow—ss.

I, John J. Parker, certify that I am the Official Court Reporter of the above entitled Court; that I reported the trial of the cause of Darby Mills, Inc., et al., vs. Atlas Assurance Co., Ltd., et al., being cause No. 566 in the above Court, tried before the Hon. W.

D. Murray, sitting with a Jury at Missoula, Montana, commencing on the 24th day of March, 1952; that the foregoing is a partial transcript of the proceedings had at said trial, and insofar as said transcript covers the proceedings had at said trial, it is a true and correct transcript.

Dated at Butte, Montana, this 1st day of August, 1952.

/s/ JOHN J. PARKER,
Official Court Reporter.

[Endorsed]: Filed August 13, 1952.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers are the originals in Case No. 566, Darby Mills, Inc., et al., Plaintiffs vs. Atlas Assurance Company, Ltd., et al., Defendants, and designated by the Appellant as the record on appeal in said cause, and that the Complaint, Answer, Interrogatories submitted to the jury, the Verdict and the Judgment are contained in the Judgment Roll.

I further certify that defendants' motion for Non-suit and defendants' motion for directed verdict, items 5 and 6 of the designation, were orally

made, and a copy of the minute entry thereof is transmitted herewith.

I further certify that I transmit herewith as a part of the record on appeal, the Reporter's Partial Transcript of Testimony filed August 13, 1952.

Witness my hand and the seal of said Court at Helena, Montana, this 9th day of September, A.D. 1952.

[Seal] /s/ H. H. WALKER,
Clerk as aforesaid.

[Endorsed]: No. 13538. United States Court of Appeals for the Ninth Circuit. Atlas Assurance Company, Ltd., a Corporation, Aetna Insurance Company, a Corporation, The Home Insurance Company, a Corporation, Providence Washington Insurance Company, a Corporation, National Union Fire Insurance Company, a Corporation, and Niagara Fire Insurance Company, a Corporation, Appellants, vs. Darby Mills, Inc., a Corporation and Alex Shulman, Doing Business as Alex Shulman Co., Appellees. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed September 12, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 13538

DARBY MILLS, INC., a Corporation, and ALEX
SHULMAN, Doing Business as ALEX SHUL-
MAN CO.,

Appellees,

vs.

ATLAS ASSURANCE COMPANY, LTD., a Cor-
poration, AETNA INSURANCE COMPANY,
a Corporation, NEW HAMPSHIRE FIRE
INSURANCE COMPANY, a Corporation,
THE HOME INSURANCE COMPANY, a
Corporation, PROVIDENCE WASHINGTON
INSURANCE COMPANY, a Corporation,
NATIONAL UNION FIRE INSURANCE
COMPANY, a Corporation, and NIAGARA
FIRE INSURANCE COMPANY, a Corpora-
tion,

Appellants.

STATEMENT OF POINTS.

Pursuant to Rule 19 (6) of the Rules of the above
entitled Court, appellants state the points upon
which they will rely on appeal are as follows:

1. The District Court erred in refusing to direct
a verdict in favor of the appellants, and against the
appellee, Alex Shulman, doing business as Alex
Shulman Company, at the close of the appellee's
case.

2. The District Court erred in refusing to direct
a verdict in favor of the appellants, and against the

appellee, Alex Shulman, doing business as Alex Shulman Co., at the close of all of the evidence.

3. The District Court erred in refusing to direct a judgment for the appellants notwithstanding the verdict.

In connection with these points the appellants intend to rely upon the proposition that as a matter of law no valid judgment could be entered against the appellants because the insurance policies specifically provide that there could be no assignment of them without the written consent of the appellant companies, and that there was no such consent; that the policies specifically provide that no agent has the power to waive any provisions of the policies unless the waiver be given in writing, and that there was no such written waiver; that the evidence shows that the agent in this case had no power to make any assignment of any interest in the fire policies in question without the express consent of the appellants, and that no such express consent was given; that the evidence fails to show that any interest in the insurance policies in question was assigned to the appellee, Alex Shulman, by the plaintiff, Darby Mills.

Dated this 12th day of September, 1952.

/s/ RUSSELL E. SMITH,

/s/ W. T. BOONE,

/s/ JACK W. RIMEL,

Attorneys for Defendant-
Appellants.

[Endorsed]: Filed September 15, 1952.